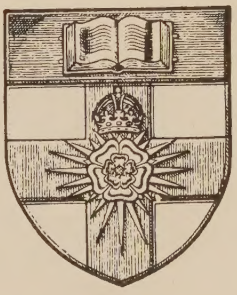
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4 Mx. North Gallery.



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-family-division_1889_14

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—JOSEPH BROWN, Esq., Q.C.

EX-OFFICIO MEMBERS.

SIR RICHARD E. WEBSTER, Knt., M.P. .	ATTORNEY-GENERAL.
SIR EDWARD CLARKE, Knt., M.P. . .	SOLICITOR-GENERAL.

ELECTED MEMBERS.

MR. SERJEANT PULLING	Serjeants' Inn.
SIR HORACE DAVEY, Knt., Q.C., M.P. JOHN RIGBY, Esq., Q.C.	Lincoln's Inn.
FREDK. MEADOWS WHITE, ESQ., Q.C. LUMLEY SMITH, Esq., Q.C.	Inner Temple.
JOSEPH BROWN, Esq., Q.C. F. A. PHILBRICK, Esq. Q.C.	Middle Temple.
HIS HONOUR JUDGE RUSSELL, Q.C. WILLIAM CRACROFT FOOKS, Esq., Q.C.	Gray's Inn.
WILLIAM WILLIAMS, Esq. (Firm—Messrs. Currie, Williams, & Williams), Lincoln's Inn Fields JOHN HOLLAMS, Esq. (Firm—Messrs. Hollams, Sons, Coward, & Hawksley), Mincing Lane, E.C.	Incorporated Law Society.

Secretary—JAMES THOMAS HOPWOOD, Esq., 10 Old Square, Lincoln's Inn.

THE

LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Probate Division.

CASES DETERMINED IN THE

COURTS OF PROBATE AND DIVORCE,

IN THE

ADMIRALTY AND ECCLESIASTICAL COURTS,

AND ON APPEAL THEREFROM IN THE

PRIVY COUNCIL,

AND IN THE

COURT OF APPEAL.

EDITOR—A. P. STONE, BARRISTER-AT-LAW.

REPORTERS.

Privy Council . . .	HERBERT COWELL,	*Barrister-at-Law.*
Court of Appeal . .	MARTIN WARE, H. CADMAN JONES, E. S. ROSCOE,	*Barristers-at-Law.*
Probate and Divorce . .	W. LEYCESTER,	*Barrister-at-Law.*
Admiralty and Ecclesiastical Cases	E. S. ROSCOE,	*Barrister-at-Law.*

VOL. XIV.

1889.—LII AND LIII VICTORIÆ.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

1889.

BIBL.
LONDIN.
UNIV.

JUDGES

OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE

LII AND LIII VICTORIÆ.

The Right Hon. Sir JAMES HANNEN, Knt., President.

The Hon. Sir CHARLES PARKER BUTT, Knt.

JUDGES

OF

THE COURT OF APPEAL.

LII AND LIII VICTORIÆ.

Lord HALSBURY, Lord Chancellor.

Lord COLERIDGE, Lord Chief Justice of England.

LORD ESHER, Master of the Rolls.

Sir JAMES HANNEN, President of the Probate, Divorce and Admiralty Division.

Sir HENRY COTTON,
Sir NATHANIEL LINDLEY,
Sir CHARLES S. C. BOWEN,
Sir EDWARD FRY,
Sir HENRY CHARLES LOPES,

} Ordinary Judges of Court of Appeal.

ERRATUM.

Page	*Line*	*For*	*Read*
50	1 from bottom	2 P. D. 206	2 P. & D. 206.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1890, will be as follows:—

In the First Series,
43 Ch. D.

In the Second Series,
24 Q. B. D. 15 P. D.

In the Third Series,
15 App. Cas.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Andrews *v.* Ross	15
Attorney General, Brinkley *v.*	83
——————, Scaramanga *v.*	83

B.

Bates *v.* Bates	(C. A.)	17
Batterbee, In the Goods of		39
Benlarig, The		3
Brinkley *v.* Attorney General		83
Brook, Lancaster *v.*		80
Butler *v.* Butler		160

C.

Calliope, The	(C. A.)	138
Colyer, In the Goods of		48
Corbett *v.* Corbett		7
Curling *v.* Curling		13

D.

Davis *v.* Davis	162
Durham City, The	85

E.

	PAGE
Eclipse, The	71

F.

Fawcett, In the Goods of		152
Field *v.* Field	(C. A.)	26

G.

Gillet *v.* Gillet	158

H.

Harver, In the Goods of	81
Hawkins, Riding *v.*	56

I.

Imbro, The	73
Indian Chief, The	24
Izard *v.* Izard	45

J.

Jackman *v.* Jackman	62

L.

		PAGE
Lancaster *v.* Brook		80
Lapington *v.* Lapington		21
Lean, Treloar *v.*		49
Lincoln (Bishop of), Read *v.*		88
———, ——— *v.*		
(No. 2)		148
Lister *v.* Lister		175
Longford, The	(C. A.)	34
Lydia, The	(C. A.)	1

M.

Middleton, In the Goods of		23
Minshull, In the Goods of		151
Monkseaton, The	(C. A.)	51
Moorcock, The	(C. A.)	64

N.

Nereid, The	78

P.

Patrick, In the Goods of	(C. A.)	42
Paxton, In the Goods of		40
Powell *v.* Powell		177

R.

Read *v.* Bishop of Lincoln	88
——— *v.* ———	
(No. 2)	148
Recepta, The	131
Riding *v.* Hawkins	56
Ross, Andrews *v.*	15

S.

Scaramanga *v.* Attorney General	83
Stettin, The	142
Stoker *v.* Stoker	60

T.

Tasmania, The	(C. A.)	53
Thornton, In the Goods of		82
Treloar *v.* Lean		49
Tweedsdale, The		164

V.

Vindobala, The	(C. A.)	50
Vindomora, The	(C. A.)	172

W.

Westbourne, The	(C. A.)	132
Wheeler *v.* Wheeler		154
Wood *v.* Wood		157

TABLE OF CASES CITED.

A.

		PAGE
Attorney-General *v.* Radloff	23 L. J. (Ex.) 240	178

B.

Beeswing, The	5 Asp. M. C. (N.S.) 484	87
Bowers *v.* Bowers	Law Rep. 5 Ch. 244	9
Brealey *v.* Reed	2 Curt. 833	16
Buckhurst, The	6 P. D. 152	52

C.

Canterbury's (Archbishop of) Case	Coke's Rep. Pt. II. 555	149
Cheerful, The	11 P. D. 3	4, 5
Chetwynd *v.* Chetwynd	Law Rep. 1 P. & D. 39	163
Clarke *v.* Scripps	2 Rob. 563	50
Coggs *v.* Bernard	Lord Raym. 909	70
Condor, The	4 P. D. 115	52
Cope *v.* Barber	Law Rep. 7 C. P. 393	149
Copland *v.* Powell	1 Bing. 369	149
Curling *v.* Wood	16 M. & W. 628	66

D.

Davy *v.* Garrett	7 Ch. D. 473	59
Dawes, In the Goods of	Law Rep. 2 P. & D. 147	153
Dordogne, The	10 P. D. 6	173
Druid, The	1 W. Rob. 399	35
Dugdale, In re	38 Ch. D. 176	9
Dunelm, The	9 P. D. 164	74, 166, 169
E. U., The	1 Spinks 63	4

E.

Edward Hawkins, The	Lush. 515	5
Evans *v.* Ascuithe	Palm. 457	91

F.

Farmer *v.* Farmer	9 P. D. 246	21
Farrands, In the Goods of	1 P. D. 439	23
Franconia, The	2 P. D. 8	74, 78
Frankland, The, and The Kestrel	Law Rep. 4 P. C. 529	173

G.

		PAGE
George Arkle, The	Lush. 382	25
Gladstone *v.* Gladstone	Law Rep. 3 P. & D. 260	161

H.

Heatley *v.* Newton	19 Ch. D. 326	43
Hepworth *v.* Hepworth	2 Sw. & Tr. 414	18
Hetherington *v.* Hetherington	12 P. D. 112	178
Hewitson *v.* Sherwin	Law Rep. 10 Eq. 53	18
Hopkins, In the Goods of	Law Rep. 3 P. & D. 235	152
Hutchinson *v.* Hartmont	W. N. 1877, p. 29	18

J.

Jonge Bastiaan, The	5 C. Rob. 323	4

K.

Kearsley *v.* Woodcock	3 Hare, 185	9
Kemp *v.* Wickes	3 Phill. 264	109, 149
Kirby Hall, The	8 P. D. 71	173

L.

Ling *v.* Ling	4 Sw. & Tr. 99	163
London, Mayor of, *v.* Cox	Law Rep. 2 H. L. 239	97, 100
Long *v.* Bishop of Cape Town	1 Moo. P. C. (N.S.) 411	98, 128
Lynch *v.* Lynch	10 P. D. 183	18, 19

M.

Machu, In re	21 Ch. D. 838	10
Macleay, In re	Law Rep. 20 Eq. 186	10
Main, The	11 P. D. 132	74, 78
Marpesia, The	Law Rep. 4 P. C. 212	52
Medley *v.* Medley	7 P. D. 122	9
Melpomene, The	4 A. & E. 129	4
Mersey Docks Trustees *v.* Gibbs	Law Rep. 1 H. L. 93	65, 69
Midgley *v.* Wood	30 L. J. (P. & M.) 57	16
Miles *v.* Chilton	6 N. of Cas. 636	16
Minnehaha, The	Lush. 335	135
Moore, In re. Trafford *v.* Maconochie	39 Ch. D. 116	9, 11
Mullingar, The	1 Asp. Mar. L. C. (N.S.) 252	35, 37

N.

Natal, Bishop of, Ex parte	3 Moo. P. C. (N.S.) 115	98, 100, 128
——— *v.* Gladstone	Law Rep. 3 Eq. 1	98

O.

		PAGE
Oliver *v.* Lowther	28 W. R. 381	159

P.

Pacific, The	9 P. D. 124	74
Palinurus, The	13 P. D. 14	74, 78
Parham *v.* Templar	3 Phill. 223	98
Parlement Belge, The	5 P. D. 197 (217)	35, 36
Payne, Re	25 Beav. 556	9
Pearson *v.* Pearson	33 L. J. (P. & M.) 156	29

R.

Reg. *v.* Canterbury, Archbishop of	11 Q. B. Rep. 483	91, 100, 128
—— *v.* Millis	10 Clark & Finnelly, 534	91
—— *v.* Pratt	Law Rep. 5 Q. B. 176	18
—— *v.* Williams	9 App. Cas. 418	65
Resolution, The	60 L. T. 430	173
Rex *v.* Wroxton, Inhabitants of	4 B. & Ad. 640	16
Ridsdale *v.* Clifton	2 P. D. 276	149
Roberts *v.* Humby	3 Mee. & W. 120	100, 127
Rochford *v.* Hackman	9 Hare, 475	9
Rose *v.* Rose	8 P. D. 98	60
Rosher, In re	26 Ch. D. 801	10

S.

St. John's College, Cambridge *v.* Toddington	1 Burr. 159	97
Salisbury's (Bishop of) Case	Godbolt's Rep. 259	96
Santipore, The	1 Spinks, 231	4
Seaton, The	9 P. D. 2	77
Sherwood *v.* Ray	1 Moo. P. C. 353	16
Sidney *v.* Sidney	17 L. T. (N.S.) 9	159
Smith, In re. Rigg *v.* Hughes	9 P. D. 68	43
Symonds *v.* City Bank	34 W. R. 364	59

T.

Taylor *v.* Morley	1 Curteis Rep. 470	100, 127
Templeton *v.* Tyree	Law Rep. 2 P. & D. 420	15
Tongue *v.* Allen	1 Curt. 38	16
True Blue, The	2 W. Rob. 176	134

U.

Upton *v.* Attorney General	32 L. J. (P. & M.) 177	84

W.

Waverley, The	Law Rep. 3 A. & E. 369	134, 136
Webb *v.* Grace	2 Phill. 701	9, 11
Whiston's Case	Broderick & Freemantle, 325	117

		PAGE
White *v.* Phillips	33 L. J. (C. P.) 33	66
Williams, In the Goods of	3 Hagg. 217	23
Wilson *v.* McMath	3 Phill. 79	100
Winch *v.* The Conservators of the Thames	Law Rep. 7 C. P. 458; 9 C. P. 378	66
Wood *v.* Wood	13 P. D. 22	22
Woods *v.* Woods	10 P. D. 172	178
Woodward, In the Goods of	2 P. & D. 206	50
——— *v.* Goulston	11 App. Cas. 469	50
Wright *v.* Elwood	1 Curt. 662	16

Y.

York, Dean and Chapter of	2 Q. B. 1	93, 126, 128

CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

LII. VICTORIÆ.

[IN THE COURT OF APPEAL.]

1888
Dec. 6.

THE LYDIA.

Practice—Appeal from County Court to Divisional Court—Appeal from Divisional Court to Court of Appeal—38 & 39 *Vict. c.* 50, *s.* 10.

The right of appeal from an order of a Divisional Court varying the judgment of a county court in an Admiralty cause is governed by the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 10, and an appeal may therefore be brought without leave from such an order to the Court of Appeal.

APPEAL from a judgment of the President and Butt, J., sitting as a Divisional Court to hear Admiralty appeals from county courts, whereby they varied the decision of the county court judge, who had held the two vessels *The Tiger* and *The Lydia* to be both to blame for the collision which was the subject of the action. The Divisional Court held *The Lydia* to be alone to blame, and refused leave to appeal.

The owners of *The Lydia* appealed.

Raikes, for the appellants.

156

1888

THE LYDIA.

Aspinall, for the owners of *The Tiger*. There is a preliminary objection to this appeal. The Divisional Court having refused leave to appeal, the Court of Appeal has no jurisdiction. Admiralty appeals from county courts are by Order LIX., r. 4, to be heard by a Divisional Court of the Probate, Divorce, and Admiralty Division. By the Judicature Act, 1873, s. 45, appeals to Divisional Courts shall be final, unless special leave to appeal is given; this Act came into operation on November 1, 1875, in accordance with the provisions of the Supreme Court of Judicature (Commencement) Act, 1874. The County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 10 (1), enacted that when the High Court of Admiralty altered the judgment of the county court no leave to appeal to Her Majesty in Council should be necessary. But that Act cannot apply to the present practice, and is inconsistent with the provisions of the Judicature Act, 1873.

Raikes, for the appellants, was not heard.

LORD ESHER, M.R. It is impossible to say that the 10th section of the County Courts Act, 1875, is not in operation, and if it is, then it clearly applies to the present case, in which the Divisional Court varied the judgment of the county court judge. I am of opinion, therefore, that leave to appeal was not required, and that the objection to our jurisdiction must be overruled.

FRY and LOPES, L.JJ., concurred.

Objection overruled.

THE COURT then heard the appeal on its merits, and dismissed it with costs.

Solicitors for owners of *The Lydia*: *Pritchard & Sons.*
Solicitor for owners of *The Tiger*: *O. H. Clarkson.*

(1) 38 & 39 Vict. c. 50, s. 10: "There shall be no appeal from a decree or order of the High Court of Admiralty of England made on appeal from the county court when such decree or order affirms the judgment of the county court, except by express permission of the judge of the High Court of Admiralty. When upon an appeal the High Court of Admiralty alters the judgment of the county court no leave to appeal to Her Majesty in Council shall be necessary."

E. S. R.

THE BENLARIG.

1888
Nov. 13.

Salvage—Agreement to attempt to tow—Payment for Work done.

In an action of salvage it appeared that the master of the defendants' ship requested the master of the plaintiffs' ship to tow his vessel to Gibraltar, which the latter agreed to attempt to do. The value of the defendants' ship, her cargo and freight, was 78,000*l.*, and at the time this request was made she was in a disabled state. The plaintiffs' ship, after towing the defendants' ship for 130 miles towards Gibraltar, left her, the hawsers having parted owing to severe weather, in a more dangerous position than she was in when she was taken in tow. The defendants' ship was afterwards towed into Gibraltar by another vessel:—

Held, that the plaintiffs were not entitled to a salvage reward, but were entitled to adequate remuneration for what they had done in fulfilment of their contract. The Court awarded them 400*l.*

ACTIONS of salvage. The plaintiffs in the first action were the owners, master, and crew of the steamship *Vesta*, of 1100 tons gross and 647 tons nett register. Her value was 7000*l.*, that of her cargo 8068*l.*, and of her freight 925*l.* The plaintiffs in the second action were the owners, master, and crew of the steamship *Admiral Rooke*. The defendants were the owners of the steamship *Benlarig*. Her value and that of her cargo and freight was 78,000*l.* For the purposes of this report it is necessary only to refer to the first action, and the claimants therein are here called the plaintiffs.

The plaintiffs in their statement of claim set out the services alleged to have been rendered by them to the *Benlarig*, and claimed a salvage reward in respect thereof. In paragraph 7 of their statement of claim it was also alleged that "The master of the *Benlarig* requested the master of the *Vesta* to tow the *Benlarig* to Gibraltar, which the latter agreed to attempt to do." But the plaintiffs did not make in their pleading any claim for money due for work done, and claimed only such an amount of salvage as the Court might award them. The defendants admitted that paragraph 7 and other paragraphs down to paragraph 14 were substantially accurate, but averred that certain damages mentioned in paragraph 8 were much exaggerated. They also alleged that the *Vesta* abandoned the attempt to save the *Benlarig*, and left her in a worse position than she originally was when taken in

1888

THE BENLARIG.

tow, and that the plaintiffs were not therefore entitled to any salvage reward.

At the trial before Butt, J., with Trinity Masters, it appeared that the *Vesta*, on December 25, 1887, while on a voyage from Fiume to Bordeaux with a general cargo, and manned by a crew of eighteen hands, fell in with a boat's crew flying signals of distress, twelve miles from Cape St. Vincent. The boat belonged to the steamship *Benlarig*, and had been sent from that vessel to seek for assistance; she was lying with her engines broken down, about twenty miles to southwards. The master of the *Vesta* agreed to attempt to tow the *Benlarig* to Gibraltar. The *Vesta* towed the *Benlarig* until about 5·30 on the following day, when one of the hawsers parted and fouled the *Vesta's* propeller, so that the other hawser had to be cut. The *Benlarig* then drifted to within three or four miles of the Cape Trafalgar light. The *Vesta* stood out to sea, intending to wait for daylight, but a heavy gale still continuing, the master decided to proceed to Gibraltar alone, and give information as to the position and state of the *Benlarig*. The *Vesta* had towed the *Benlarig* about 130 miles, and in consequence of the towage sustained considerable damage. The *Benlarig* was afterwards towed into Gibraltar by the *Admiral Rooke*.

Kennedy, Q.C., and *Barnes, Q.C.*, for the owner, master, and crew of the *Vesta*. These plaintiffs are entitled to a salvage reward. The *Benlarig* was brought nearer to Gibraltar by the services of the *Vesta*, these plaintiffs are therefore entitled to be considered as salvors: *The Jonge Bastiaan* (1); *The E. U.* (2) It is not material that the vessel, which was ultimately saved, was left by the *Vesta* in a position of greater danger than that in which she was found, if some benefit was rendered to her: *The Santipore* (3); *The Melpomene*. (4)

[BUTT, J. I shall abide by my decision in *The Cheerful* (5), which is against your present contention.]

Secondly. The plaintiffs in the alternative are entitled to be

(1) 5 C. Rob. 323.
(2) 1 Spinks, 63.
(3) 1 Spinks, 231.
(4) Law Rep. 4 A. & E. 129.
(5) 11 P. D. 3.

paid a reasonable sum for having fulfilled the contract entered into by them, viz. to attempt to tow the *Benlarig* to Gibraltar.

Sir W. Phillimore, and *Barnes, Q.C.*, for the owners, master, and crew of the *Admiral Rooke.*

Myburgh, Q.C., and *Raikes*, for the defendants. The plaintiffs in the first action are clearly not entitled to salvage: *The Edward Hawkins* (1); *The Cheerful.* (2) Secondly. There is no difference in this from any other salvage case. There is always some kind of agreement to tow or to do the best possible for the ship in distress, but it is in effect to save the ship. The plaintiffs are, therefore, not entitled to any salvage or payment, their services having been of no benefit to the *Benlarig.*

Kennedy, Q.C., in reply.

BUTT, J. Dealing first with the case of the *Vesta*, it is contended by the defendants that, though she did what she could, and towed the *Benlarig* 130 miles towards Gibraltar, yet leaving the latter where and when she did, the *Vesta* really left her in a worse position than when she took her in tow. By worse position I mean a more dangerous position. That has been my view throughout the case, and I find that the Elder Brethren agree with me. It has been rightly argued that that being the state of the case, the *Vesta* is not entitled to a salvage award in the ordinary acceptation of the words. I so held in the case of *The Cheerful* (2), on what I considered to be a binding authority, and I must again act on the same principle.

But then arises another question. It has been argued that apart from mere salvage remuneration which this Court awards to successful salvors, there is here an express contract between the parties, and that the captain of the *Vesta* duly performed his part of it.

In the seventh paragraph of the statement of claim on behalf of the *Vesta* it is alleged that the master of the *Benlarig* requested the master of the *Vesta* to tow the *Benlarig* to Gibraltar, which the latter agreed to attempt to do.

The first paragraph of the statement of defence is that the defendants admit that paragraphs 2 to 14, inclusive of state-

(1) Lush. 515. (2) 11 P. D. 3.

1888

THE BENLARIG.

ment of claim, are substantially correct, except that the damage spoken of in paragraph 8 was greatly exaggerated. Therefore the defendants admit the allegations of paragraph 7, which I regard as an averment of a contract made between the two parties, not a contract merely to render salvage service, and certainly not a contract to take the vessel into Gibraltar; but a contract with the master of the *Benlarig* by the master of the *Vesta* that the latter would attempt to do so. The captain of the *Vesta*, writing to his owners, says, "The captain wanted to be towed to Gibraltar. I promised to do my best for him; terms to be settled by owners and underwriters." I think it is clear that the captain of the *Vesta* did his best to tow this vessel to Gibraltar, and therefore that he performed the contract mentioned in the pleadings. I have now only to consider what remuneration should be given for this work.

The plaintiffs in the *Vesta's* action are clearly not entitled, as I have already held, to the salvage remuneration which salvors should receive, who take their chance of saving a vessel, but still they are entitled to remuneration for hard and dangerous work, properly, if not effectively done.

I am glad to be able to hold that they are entitled to some payment, because I think it would be very unfortunate in any way to discourage steamers from rendering assistance to vessels in distress. In this, as in some recent cases, I am sorry to see a decreasing tendency to aid vessels that are broken down. I now pass to the case of the *Admiral Rooke*.

[The learned judge then considered the services of this vessel, and awarded her 3500*l*., and then proceeded:—]

As regards the *Vesta*, I assess the sum to which she is entitled at 400*l*. I will again point out that the *Benlarig* was not saved by the *Vesta*, and that this sum is awarded for fulfilling her contract.

The interests of the plaintiffs were so antagonistic that it is a case in which both sets of plaintiffs will be allowed their costs.

Solicitors for all plaintiffs: *T. Cooper & Co.*

Solicitors for defendants: *Waltons, Bubb, & Johnson.*

E. S. R.

CORBETT *v.* CORBETT.

1888
Nov. 15.

Divorce—Settlement—Prohibition against Alienation—Absolute Interest—Forfeiture—Repugnant Condition.

By an instrument in the form of a settlement but proved as a will, real and personal estate was given to trustees upon trust for the sole use and benefit of the respondent (son of the settlor), his heirs, executors, and administrators, to be assigned and transferred to him as soon as conveniently might be after the settlor's death, subject to a proviso that if the respondent should die unmarried and without issue his share should go over, and also that the property assigned in trust for the respondent was to be held by the trustees upon the express condition that he should not during his life have power to mortgage, sell, alien, charge, or incumber any part of the property, and in that event the trustees should stand possessed of such property in trust for other persons.

Held (affirming the judgment of Butt, J. (13 P. D. 136)), that the respondent took an absolute interest in fee simple under the instrument, and that the condition of forfeiture in case of charge or alienation was therefore void as repugnant; and accordingly that he could be ordered to secure to his divorced wife an annual sum for maintenance by a charge on his interest under the instrument.

And *semble* (per Bowen, L.J.) that the condition was limited to alienation during the lifetime of the settlor, in which case there would be no repugnancy.

APPEAL from an order of Butt, J. (1), securing to the petitioner, the wife of the respondent, the annual income of 84*l.* for her own life, by a charge on the respondent's property under the will of his father.

The question argued was whether, upon the construction of the instrument under which the respondent was entitled, the charge, if executed, would cause a forfeiture of his interest in the property.

By an instrument of August, 7, 1879, in the form of a settlement, but proved as a will, James Corbett, the father of John Nicholas Corbett (the respondent in the Divorce Court), granted and assigned unto Ann Corbett and Daniel Healy, and the survivor of them, their heirs, executors, and administrators, certain freehold and leasehold property, stocks and securities, and personal estate, from and immediately after the death of him (James Corbett), upon trust, in the first place, to pay thereout all his

(1) Reported 13 P. D. 136.

1888

CORBETT v. CORBETT.

just debts and funeral and testamentary expenses, and subject thereto, as to one third share of the property assigned (the particulars of which were specified) upon trust to and for the sole use and benefit of John Nicholas Corbett (the respondent), his heirs, executors, and administrators, and to be assigned, transferred, and made over to him as soon as conveniently might be after the death of James Corbett, but subject to the following proviso:—

"Provided always, and it is hereby expressly declared and agreed upon by and between the parties hereto, and it is the true intent and meaning hereof, that in the event of the death of any or either of the said three sons of the said James Corbett unmarried and without lawful issue, that the share or shares of him or them so dying shall go to and be equally divided amongst such of the other children of James Corbett as shall be then living, save and except such of them as should be then nuns in holy orders.

"And provided further that the freehold and leasehold property hereby conveyed and assigned for the use of the three sons of James Corbett is hereby so conveyed and assigned to the trustees, and it is to be held by them upon the express condition that neither of the said sons, during their or either of their lives, have power to mortgage, sell, alien, charge, or incumber any part of same, and in the event of either of them so doing, then and in that event the trustees shall stand possessed of the share of such son or sons so charging, incumbering, or parting with his share of said property hereby limited to him, in trust for the other sons of the said James Corbett, and to the entire exclusion of the son so selling or incumbering his share of the said property or any part thereof."

The petitioner and the respondent were married in 1886, and in January, 1888, a decree for dissolution of the marriage on the ground of the respondent's adultery and cruelty was made absolute. The petitioner had thereupon presented a petition for permanent maintenance. The respondent was a surgeon in Her Majesty's navy, and in receipt of pay and allowances amounting to £228 2*s.* 6*d.* per annum. He also received an

income of £109 4*s.* 6*d.* from the property under his father's will or settlement.

On June 20, 1888, Butt, J., made the order appealed from, that the respondent should, to the satisfaction of the Court, secure to the petitioner (the wife) the annual sum of 84*l.* for her own life by a charge on his property under the will of his father. The respondent appealed.

G. Cave, for the respondent. No order ought to have been made under s. 32 of the Act of 1857, as the estate of the respondent is expressly made defeasible on alienation. The order is also bad from not containing the proviso, "*dum sola et casta vixerit*," which Butt, J., declined to insert on the ground that he disapproved of that proviso.

Farwell, for the petitioner. The learned judge left that question to be determined when the deed came to be settled, which was after the order appealed from had been made, and therefore the point cannot be raised on this appeal: *Medley* v. *Medley*. (1)

[THE COURT decided that this point could not now be raised.]

Then it is submitted that the property devised to the husband cannot be charged without causing a forfeiture of all his interest therein. In all the cases in which such a proviso has been held repugnant and void, except *In re Dugdale* (2) which was the case of an equitable devise with an executory gift over, and may be distinguished, there has been an absolute legal devise in fee simple, followed by a general restraint on anticipation. Here the devise is not absolute and unqualified, with a repugnant condition superadded, but the proviso is in the nature of a limitation which qualifies and controls the preceding gift, and, therefore, so long as it does not offend against the rules of perpetuity, may be upheld as a valid limitation over on the happening of the particular event: *Webb* v. *Grace* (3); *In re Moore*, *Trafford* v. *Maconochie* (4); *Rochford* v. *Hackman* (5); *Kearsley* v. *Woodcock* (6); *Re Payne* (7); *Bowers* v. *Bowers*. (8) [*In re*

(1) 7 P. D. 122.
(2) 38 Ch. D. 176.
(3) 2 Ph. 701.
(4) 39 Ch. D. 116.
(5) 9 Hare, 475.
(6) 3 Hare, 185.
(7) 25 Beav. 556.
(8) Law Rep. 5 Ch. 244.

1888

CORBETT v. CORBETT.

Machu (1), and *In re Rosher* (2), were also referred to upon this point and distinguished.]

The fact that this is an equitable and not a legal gift also distinguishes the case, as by analogy to the doctrine of separate estate a restraint upon anticipation may be imposed upon that which is merely an equitable interest. Then the restriction in this case is limited to the lifetime of the respondent, and being a limited, as distinguished from an unlimited, restraint upon alienation is valid: *In re Macleay.* (3)

The respondent, although he cannot charge the property, will submit to a personal order for payment of a weekly or monthly sum.

Farwell, for the petitioner, was not heard.

COTTON, L.J. (after stating the case). The first question is, what estate did the respondent take under his father's will? I have no doubt, though the instrument is not accurately or well-framed, that what was intended to be given to him was an absolute estate in fee simple in the real estate, and an absolute interest in the personal estate, with a proviso that if he died without having children of his marriage it was to be cut down and go over. There was also another proviso restraining him from mortgaging or in any way alienating the property or charging it. It has been contended that this deed which he has been ordered to execute will have the effect of defeating the estate which he has under the deed, and the question which we have to consider is whether that proviso is not bad, and, if we have to construe the deed, whether this is a mortgage or charge (that is one thing), and then whether, if that is not the true construction, the contention that it is a bad proviso can prevail. There is an absolute gift to him, his heirs and assigns, and then a direction to the trustees to assign, transfer, and hand over the property to him as soon as conveniently may be after the decease of the settlor. It would be making a new deed for the settlor to say that the effect of it was to give him an interest limited until alienation, and not to give him an absolute interest subject to that proviso.

With regard to the legal estate it was hardly contended that

(1) 21 Ch. D. 838. (2) 26 Ch. D. 801, 811.
(3) Law Rep. 20 Eq. 186.

such a proviso as this would not be bad as being inconsistent with the estate already given to the respondent. But it was suggested that in the case of trust estates that rule does not apply. I cannot follow that. It is very true that in the case of married women a restraint on anticipation has been allowed, but that restraint cannot be introduced in the case of an equitable limitation in favour of a man. Until Parliament adopted that doctrine in the Married Women's Property Acts, separate estate was a mere creature of equity, and equity has said that such provisions in regard to restraint on anticipation as will give it full effect may be implied. But that rule does not apply to the introduction of a proviso of this kind, and in no other case has a practice encroaching upon the rule against fettering an absolute interest once given been introduced. If an estate for life had been given it might have been construed as a gift until alienation, and as not being defeated by the proviso. We did that recently in *In re Morris, Trafford* v. *Maconochie* (1), where there was a gift of an annuity for a limited period only, as in *Webb* v. *Grace* (2), where a gift of an annuity of 40*l.* was followed by a proviso that if the lady married it should be cut down to 20*l.*, and it was held not to be an unqualified grant of an annuity of 40*l.* for life with a condition subsequent in restraint of marriage, but a grant of 40*l.* per annum during so much of her life as she should remain unmarried, and after she married of 20*l.* only. It is impossible, however, to adopt that construction of the present instrument. I think in this case that this proviso giving over the property in the event of alienation, being inconsistent with the absolute estate originally given, is bad. But then it is said, why is not the first part of the proviso giving the property over in the event of his dying without issue, bad? That proviso, however, is in no way repugnant to his estate. A man having an absolute estate does not necessarily marry and have children, and it is not repugnant therefore to the gift of the estate. It is a limitation not within the rule, nor is it a violation of the law of perpetuity.

In my opinion, therefore, the objection cannot prevail, and the order of the learned judge was right.

(1) 39 Ch. D. 116. (2) 2 Ph. 701.

1888

CORBETT v. CORBETT.

LINDLEY, L.J. I am of the same opinion. It is said that this allowance to the wife for maintenance cannot be secured to her on her former husband's property, as the only property which he has got has been so limited in the gift to him that if he charges it, whether under a conveyance or by an order of the Court, he thereupon ceases to be owner of the property. Now if that had been true the order appealed from would not have been made. That gives rise to the question whether the interest in the property on which this maintenance is charged is or is not liable to be defeated by the order itself. The instrument on which the question turns is a somewhat curious one. It is what is called a voluntary settlement made by a gentleman in his lifetime, and although it does not express in so many words a previous trust for himself, yet as all the trusts expressed in it are to take effect after his death, there is an implied life estate. Now there are two possible views to take of that instrument. In one view the gift over in the event of this second son dying unmarried and without issue applied to the event happening in the lifetime of his father, and the proviso against mortgaging and selling and so on was also intended to apply to mortgaging, selling, and so on in the lifetime of his father. If that is the true construction of this instrument there is no difficulty in the case, because then there would be no repugnancy at all. But I think that these clauses are not confined to the period of the father's lifetime. If I am right in this, these clauses are absolutely repugnant to the interest which is given to the respondent. The trustees are to hand over the property to him as soon as his father dies, and they are to hand it over to him subject to this clause as to alienation. What was meant is plain enough—that the son was to take the property, and that if he made away with it it was to go over. Well, if that be so, the proviso against alienation is repugnant and cannot be allowed. I cannot at all accede to the suggestion that in cases of this description there is any difference between equitable and legal estates. It is a mode of disposing of property, and whether it is done by a legal estate or an equitable estate it is the same thing.

I think, therefore, the appeal must be dismissed with costs.

BOWEN, L.J. I am of the same opinion. I am not at all sure at this moment which construction of this instrument I should adopt. It is not a will, it is really a deed, and a deed which conveys property to trustees with the intention that they should transfer the property to those who are beneficially interested in it at the death of the grantor, who would enjoy a life estate by implication. But the deed operating immediately, it might be that the beneficiaries would charge their interests accruing upon the death, unless some provision was made against alienation; and it seems to me that such provision against alienation is amply explained and is sufficiently intelligible if it is treated as being a condition to take effect during the lifetime of the deceased. That seems to me to be the right interpretation of the instrument. Then if that is so, there is no repugnancy, and the order of Butt, J., must be right.

But taking the other view—which I think my learned Brothers prefer to hold—that this is a clause intended to prevent alienation after the death of the settlor—a view which I myself do not at the present moment feel satisfied to agree with—then I think it is plainly inconsistent with the absolute gift, and must therefore be rejected; so that in either alternative I think the order of Butt, J., was right.

Appeal dismissed.

Solicitors: *Pontifex, Hewitt & Pitt; Wynne, Holme & Wynne.*

F. G. A. W.

CURLING *v.* CURLING.

Oct. 30.

Divorce—Wife's Petition—Counter-charge of Adultery by the Husband—Leave to proceed without making a co-Respondent—20 & 21 *Vict. c.* 85, *s.* 28; 29 *Vict. c.* 32, *s.* 2.

In a wife's petition for divorce, her husband, in his answer, made a counter-charge of adultery against his wife, and prayed for a divorce. On an application made on behalf of the husband, by direction of the registrar, to be allowed to proceed without making a co-respondent, the Court granted the application, but reserved the question whether it has power to make a man a co-respondent in such a suit.

THIS was a suit of the wife praying for a divorce on the ground of adultery coupled with cruelty. The petition, which

1888

CURLING v. CURLING.

was filed in February, 1888, originally charged the husband with adultery only, and prayed for a judicial separation. The husband in his answer denied the adultery.

In July, 1888, the petitioner obtained leave to amend her petition by adding a charge of cruelty by the communication of disease, and in support of it made an affidavit that she was unaware of the nature of the disease at the time when she filed her original petition. The husband, in his amended answer, denied the communication of disease, charged his wife with having committed adultery with some man unknown—and prayed for a divorce.

An order was made in the registry that the respondent should apply for leave to proceed without a co-respondent.

B. Deane, for the respondent, now moved for leave accordingly.

[BUTT, J. I am not clear that such an order would be regular. It does not seem to come within the 28th section of the 20 & 21 Vict. c. 85.]

The 2nd section of the 29 Vict. c. 32, empowers the Court to give a respondent the same relief to which he or she would be entitled if he or she had filed a petition seeking such relief.

BUTT, J. This hardly seems to come within the description of relief there contemplated. My doubt is whether I should have the power to make a man a co-respondent under such circumstances as these. However, I will allow you to proceed without a co-respondent as you ask, but I must not be taken to decide that I have the power to make a man a co-respondent in such a suit.

Solicitors: *Baker & Nairne.*

W. L.

ANDREWS, FALSELY CALLED ROSS *v.* ROSS. 1888 *Oct.* 30; *Nov.* 6.

Nullity—Marriage with Deceased Wife's Sister—Both Parties cognizant of Impediment—5 & 6 Wm. 4, c. 54, s. 2—20 & 21 Vict. c. 85, s. 22.

A decree will be made declaring a marriage with a deceased wife's sister null and void, although it is shewn that both parties at the time of the celebration of the marriage were aware of the impediment.

Miles v. *Chilton* (6 N. of Cas. 636) followed.

PETITION by Susannah Elizabeth Andrews, otherwise Ross, praying that her marriage with the respondent, J. Mackenzie Ross, might be declared null and void on the ground that it was within the prohibited degrees, and void under the 5 & 6 Wm. 4, c. 54, s. 2.

It appeared that the respondent was married on June 6, 1871, to Emma Gertrude Andrews, the sister of the petitioner, who was herself present at the marriage. Mrs. Ross died in 1874, and on December 19, 1876, the petitioner went through the form of marriage with the respondent.

At the hearing before Butt, J., the petitioner was called to prove the facts, and stated that she was present at the respondent's marriage with her sister in 1871.

The respondent did not appear.

[BUTT, J.:—If two persons choose to go through a form of marriage which they know to be void why should this Court be asked to make a formal decree that such marriage is null and void?]

Middleton, for the petitioner. In the case of insufficient publication of banns it is necessary to invalidate the marriage to prove that both parties were aware of the defect, and wilfully and knowingly consented to the undue publication. That was held in *Templeton* v. *Tyree*. (1)

[BUTT, J. In that case the suit was brought by a third party.]

That is not material. The Court has entertained and has pronounced decrees of nullity in suits promoted by one or other

(1) Law Rep. 2 P. & D. 420.

1888

ANDREWS v. ROSS.

of the parties where they have knowingly and wilfully married without due publication of banns.

[He cited *Midgley* v. *Wood* (1); *Tongue* v. *Allen* (2); *Wright* v. *Elwood* (3); *Rex* v. *Inhabitants of Wroxton* (4); *Brealey* v. *Reed* (5); *Sherwood* v. *Ray*. (6)]

The suit is instituted by the petitioner quia timet—in apprehension that an Act of Parliament may be passed legalising marriages like the present marriage—which may be retrospective in its operation. Before Lord Lyndhurst's Act these marriages were not void but voidable.

Cur. adv. vult.

BUTT, J. The facts of this case are very short. The petitioner was the sister of the first wife of the respondent, who died shortly after marriage. The petitioner was present at the marriage of her sister to the respondent, and was, therefore, perfectly well aware of whatever impropriety or illegality there may have been in the marriage. She chose to go through the ceremony of marriage with a knowledge of all the circumstances. In that state of things, and in accordance with all the principles of law administered in other Courts, she would not be allowed to sue for a declaration of nullity of marriage. In other words she would not be allowed to get rid of any obligation she had entered into with her eyes open. But the authorities cited, and especially the authority of *Miles* v. *Chilton* (7), shew that the Ecclesiastical Courts have applied a different rule, and that the principles prevailing in regard to contract of marriage differ from those prevailing in all other contracts known to the law. It is not necessary that I should go into the cases, suffice it to say that the authorities shew that the Ecclesiastical Courts would pronounce this marriage null and void under the circumstances to which I have referred. By s. 22 of the Matrimonial Causes Act of 1857 it is provided that in all suits and proceedings other than proceedings to dissolve any marriage, the Court shall

(1) 30 L. J. (P. & M.) 57.
(2) 1 Curt. 38.
(3) 1 Curt. 662.
(4) 4 B. & Ad. 640.
(5) 2 Curt. 833.
(6) 1 Moo. P. C. 353.
(7) 6 N. of Cas. 636; 1 Rob. 684.

proceed to act and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted. By them I am bound. Therefore I consider myself called upon to declare this marriage null and void, but I shall refuse the petitioner her costs.

1888

ANDREWS v. ROSS.

Solicitors: *Todd, Dennes, & Co.*

W. L.

[IN THE COURT OF APPEAL.]

Dec. 21.

BATES *v.* BATES.

Divorce—Wife's Costs—Security—Attachment—Debtors Act, 1869, *s.* 4.

In a wife's petition for judicial separation the husband was ordered to pay a sum of money into court as security for her costs. He made default in payment:—

Held, that this was not "default in payment of a sum of money" within s. 4 of the Debtors Act, 1869, and that he was liable to attachment for disobeying the order of the Court.

Lynch v. *Lynch* (10 P. D. 183) approved.

APPEAL by A. J. P. Bates, the respondent in a petition for judicial separation by his wife, from an order of Butt, J., giving leave to the petitioner to issue an attachment against him for not complying with an order of the Court made on August 14, 1888.

The petition was presented by the wife on the ground of the cruelty of the respondent, and on August 14, 1888, before the cause came to a hearing, an order was made by Sir J. Hannen that the respondent should within seven days pay to the solicitor of the petitioner the sum of 41*l.* 3*s.* 5*d.*, being the amount of the petitioner's costs already incurred, as taxed, and should within the same time pay into court 40*l.*, estimated by the registrar as sufficient to cover the costs and expenses of the petitioner of and incidental to the hearing of the cause, or give a bond under the hand and seal of the respondent and of two sufficient sureties for 80*l.*, for payment of the costs of the petitioner, not exceeding the sum of 40*l.*

The respondent having altogether failed to comply with this order, the petitioner applied for leave to issue a writ of attach-

1888

BATES v. BATES.

ment against him for not paying the sum of 41*l.* 3*s.* 5*d.* due for taxed costs, and for not paying into court the sum of 40*l.* or giving a bond as required by the order. Butt, J., gave leave for the writ to issue, and from this order the respondent appealed.

Pritchard, for the respondent. The issue of the writ was in violation of the 4th section of the Debtors Act, 1869 (32 & 33 Vict. c. 62), which enacts that, with certain exceptions which do not apply to this case, no person is to be arrested or imprisoned for "making default in payment of a sum of money." There can be no doubt that the attachment cannot be supported in respect of the non-payment of the sum of 41*l.* 3*s.* 5*d.*, the taxed costs mentioned in the first part of the order: *Hewitson* v. *Sherwin.* (1) And there is no real distinction between that sum and the sum ordered to be paid for estimated future costs. The learned judge made the order on the authority of *Lynch* v. *Lynch* (2); but that decision has never been affirmed by the Court of Appeal, and it is not consistent with the true meaning of the Act. Any sum of money ordered by the Court to be paid is a debt on which an action can be brought, and which can be recovered by the ordinary process of the law. The alternative order to find security is merely subsidiary to the order to pay the money and was intended for the relief of the husband. It does not take the case out of the protection of the Act: *Reg.* v. *Pratt* (3); *Hepworth* v. *Hepworth.* (4)

Mears, (*C. A. Middleton*, with him), for the petitioner. It may be conceded that the first part of the order referring to the sum due for taxed costs cannot be supported. The second part of the order, relating to the sum to be brought into court and the bond, is in accordance with the practice of the Court and is supported by *Lynch* v. *Lynch.* (2) Default in paying money into court is not default in payment of a sum of money within the meaning of the Act. The statute was intended to protect ordinary debtors, and does not apply to money ordered to be deposited in court as security: *Hutchinson* v. *Hartmont.* (5)

Pritchard, in reply.

(1) Law Rep. 10 Eq. 53.
(2) 10 P. D. 183.
(3) Law Rep. 5 Q. B. 176.
(4) 2 Sw. & T. 414.
(5) W. N. 1877, p. 29.

1888

BATES v. BATES.

COTTON, L.J. The attachment in this case was ordered for the non-payment by the appellant to the solicitor of the petitioner of the sum of 41*l.* 3*s.* 5*d.* for taxed costs, and for not paying into court a sum of 40*l.*, her estimated costs of the hearing of the cause, or giving a bond to secure that amount. It was conceded by the counsel for the petitioner that the first part of the order could not be supported; it must therefore be varied in that respect. Then came the question whether the order was right as to the other part, which directed the attachment to issue for default in lodging 40*l.* in court or giving a bond for 80*l.* It was admitted that this part of the order was in accordance with the practice of the Divorce Court, and that its regularity was expressly declared in *Lynch* v. *Lynch*. (1) But it was said that it was in violation of the 4th section of the Debtors Act, which enacted that no person should be imprisoned for making default in payment of a sum of money, with certain exceptions which do not apply to the present case. In my opinion the order for attachment was not in violation of the Debtors Act, because it was not for default in payment of a sum of money within the meaning of that section. The object of the Act was to prevent the imprisonment of persons for nonpayment of ordinary debts. No doubt the words used in the Act are very wide; but we must consider what was really meant by the payment of a sum of money. This order was not for the payment of a sum of money to the respondent; nor was it simply an order for the appellant to pay a sum of money into court; but there was an alternative, he was either to pay the money or to give a bond. It was argued that the mention of the bond was only subsidiary to the order for payment of the money, that the order was in effect simply an order to pay the money. I do not take that view. If the appellant had given the bond, he would have complied with the order. The bond might have produced nothing, but the order would have been complied with. Even if the appellant was not able to pay the money, he might have given the bond; it must have been mere wilfulness on his part which prevented him from doing so. The order was an order to give security, and as such was not within the 4th section of the

(1) 10 P. D. 183.

1888

BATES v. BATES.

Debtors Act, and in my opinion the Court was quite competent to order the attachment to issue. With the variation which I have before stated, the order must be affirmed.

LINDLEY, L.J. I am of the same opinion. The question turns upon the words of the 4th section of the Debtors Act. It is said that the appellant is within the protection of the Act, because he has made default in payment of a sum of money. But what do the words "payment of money" in this section mean? In my opinion, they do not mean depositing a sum of money in court, to abide an order to be subsequently made. If the appellant had been ordered to pay the money to the receiver of the Court in discharge of an obligation to which he had been declared liable, that might be different. But that is not so here; he is to deposit the money in court, or to give security for it. That is not within the meaning of the words of the Act. Therefore the appellant is liable to be arrested for contempt of Court for not having complied with the order. The latter part of the order appealed from is right, and must be affirmed. The former part appears to have been made by an oversight, and the order must be varied in that respect.

BOWEN, L.J. I am of the same opinion.

Solicitors: *Cooper & Bake*; *Bradley*.

M. W.

LAPINGTON *v.* LAPINGTON. 1888 Oct. 26, 27.

Divorce—Two Years' Desertion not complete at the time of filing the original Petition—Amendment—Fresh Petition—Pleading.

A petition presented by a wife for dissolution on the ground of adultery and cruelty was filed in August, 1886. In June, 1886, the respondent deserted his wife and had never afterwards returned to cohabitation, and in July, 1888, she obtained leave to amend her petition by adding a charge of desertion. The Court at the hearing, when the charge of cruelty was abandoned, declined to entertain the charge of desertion on the ground that the cause of action was not complete at the time of filing the petition, and while ready to grant a judicial separation on the ground of adultery, *held*, that further relief could only be obtained by filing a fresh petition.

PETITION by Kate Lapington for a dissolution of her marriage with Thomas Samuel Lapington on the ground of adultery coupled with cruelty and desertion. The respondent had not filed an answer.

The petition was presented in August, 1886, and originally alleged adultery coupled with cruelty only. In June, 1886, the respondent deserted his wife, and had ever since continued to live apart from her. On July 5, 1888, the petitioner obtained leave to amend her petition by adding the following new paragraph:—

"That on or about June 6, 1886, the said Thomas Samuel Lapington deserted your petitioner without reasonable cause, and for the space of two years and upwards has continued to desert her."

At the hearing before Butt, J., *Searle*, for the petitioner, intimated that he intended to abandon the charge of cruelty and would rely on the desertion.

BUTT, J. I cannot see how you are entitled to relief on that ground on this petition. The cause of action did not exist when the suit was commenced. At common law if a man issues a writ before the credit has expired he cannot obtain judgment on that writ by a simple amendment. He must commence a fresh proceeding. In *Farmer* v. *Farmer* (1), under similar circumstances,

(1) 9 P. D. 246.

1888

LAPINGTON v. LAPINGTON.

the President offered the petitioner a choice between a judicial separation and waiting until the term of two years was complete—but then to proceed, not by way of amendment, but by filing a fresh petition.

Searle, referred to *Wood* v. *Wood* (1), where a supplemental petition was filed and a decree pronounced upon it.

BUTT, J. In principle I do not see the difference between amending a petition by adding new charges and filing a supplementary petition. If there is anything in my objection it is that the cause of action had not arisen when the suit was commenced, and that is not got over by an amended petition or a supplementary petition. I am ready to grant you now a judicial separation on the ground of adultery, which will not prevent further action on your part to turn it into a decree nisi for dissolution on the ground of desertion, but it must be by a fresh suit.

Subsequently *Searle* intimated that he preferred to withdraw the petition in order to commence de novo, and leave was accordingly given to withdraw the petition.

Solicitors: *Digby & Co.*

(1) 13 P. D. 22.

W. L.

IN THE GOODS OF MIDDLETON.

1888
Dec. 21.

Administration—Grant—Application to pass over the Widow on the Ground of Misconduct—Citation—Practice—21 *Hen.* 8, *c.* 5 ; 20 & 21 *Vict. c.* 77, *s.* 73.

On an application for a grant of administration to the father of the intestate, passing over his widow, against whom misconduct was charged, the Court refused to make the grant without citing the widow.

THIS was an application for a grant of administration of the estate of a deceased intestate to his father, passing over his widow, on the ground of her misconduct.

It appeared that David Middleton, the deceased, was married in August, 1875, to Emma Partridge, and twelve months after the marriage she committed adultery. Her husband forgave her, and resumed cohabitation, but she subsequently left him and led an immoral life at Kidderminster, where she contracted a bigamous marriage, and subsequently went to America, where she then was.

David Middleton died on September 29, 1888, intestate, leaving his widow, father, and sister surviving.

B. Deane, on an affidavit setting out these facts, moved for a grant of administration to the intestate's father passing over the widow. 21 Hen. 8, c. 5, gives the Court discretion, or under the special circumstances of the widow's absence in America the grant may be made under the 73rd section of the Court of Probate Act. [He referred to *In the Goods of Williams* (1) and *In the Goods of Farrands.* (2)]

BUTT, J. I do not think such a grant has ever been made without giving the person against whom such charges are alleged the opportunity of answering them. To do so would be to open a very wide door to misrepresentation. I am afraid I must require you to cite the widow.

Solicitors : *Day & Son.*

(1) 3 Hagg. 217. (2) 1 P. D. 439.

W. L.

1888
Dec. 13.

THE INDIAN CHIEF.

Ship—Collision—Thames Rules—Rules 6 *&* 7.

By the Rules for the Regulation of the Navigation of the River Thames between Yantlet Creek and Teddington Lock: Rule 6, "A sailing-vessel under way, or being towed, shall only carry the side lights provided by (*b*) and (*c*) of rule 5 for a steam-vessel under way." Rule 7, "A sailing-vessel or a barge when at anchor in the river shall carry, where it can best be seen, at a height not exceeding twenty feet above the hull, a white light or a globular lantern of not less than eight inches in diameter.

The plaintiff's sailing-barge, at the time of a collision, was dredging down the Thames with her anchor down to check her way, with her mast lowered on deck, and with a white light attached to the mast case:—

Held, that the barge was not, under the circumstances, a sailing-vessel under way within rule 6 of the Thames Rules, or a vessel at anchor within rule 7 of the same rules, and, therefore, that she was justified in carrying the light which she did.

Action of damage transferred from the City of London Court.

The judge of the City of London Court having heard the evidence and found certain facts, ordered that the action should be transferred to the High Court under the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 8.

On April 24, 1888, Butt, J., gave leave to the parties to file an agreed statement of facts, and to enter the action for trial. The parties not being able to agree upon the facts, Butt, J., on October 30, 1888, ordered that the case should be tried on the preliminary acts.

Dec. 13. The case was heard with witnesses.

It appeared that a collision occurred between 5 and 6 P.M. on November 17, 1887, between the plaintiff's sailing barge *Marian* and the defendant's steam-tug *Indian Chief*, above the Albert Bridge in the River Thames. The *Marian* was dredging down the river with her anchor down to check her way; she carried a white or riding light on her mast case, the mast itself being lowered on deck: it was not intended to use it till the *Marian* got below London Bridge.

The *Indian Chief* was also proceeding down the river, and came into collision with the *Marian* when overtaking her, though the

master of the *Marian* took the white light from its place and waved it and hailed the steamer.

Sir W. Phillimore, and *Gaskell*, for the plaintiff.

Bucknill, Q.C., and *Pyke*, for the defendants.

Bucknill, Q.C. The *Marian* is to blame for not complying with rule No. 6 (1) of the Thames Rules, which applies to a sailing-vessel under way, for the *Marian* was both a sailing-vessel and under way. If she was not under way then she must have been a vessel at anchor, and the terms of rule 7 (2) are applicable, and she did not comply with the rule. [He referred to *The George Arkle*. (3)]

Sir W. Phillimore, for the plaintiff. The *Marian* was carrying a proper light; neither rule 6 nor rule 7 was applicable to her; she was not a sailing-vessel at the time of the collision, nor was she a vessel at anchor.

BUTT, J. The first question to be decided in this case is whether the *Marian* carried any light? I am of opinion that she carried a good anchor light, and that it was waved to the steamer by the master of the barge.

The next question is, was it right to exhibit this white light only? If the *Marian* was at the time of the collision a sailing-vessel under way, within the meaning of rule 6, then she ought to have been carrying side lights. But I am clearly of opinion that she was not; her mast had been lowered to enable her to go under the bridges, and it would not have been raised till she had passed through London Bridge. It has been argued that there is risk

(1) "6. A sailing-vessel under way, or being towed, shall only carry the side lights provided by (*b*) and (*c*) of rule 5 for a steam-vessel under way" ((*b*) and (*c*) refer to the ordinary green and red side lights).

(2) "7. A steam-vessel, a sailing-vessel, or a barge, when at anchor in the river, shall carry where it can best be seen, at a height not exceeding twenty feet above the hull, a white light, in a globular lantern of not less than eight inches in diameter, and so constructed as to shew a clear, uniform, and unbroken light, visible all round the horizon, of a distance of at least one mile: provided always that where masted vessels are lying in tiers, the outermost off-shore masted vessels only of each tier shall each carry a light similar to that required for vessels at anchor; but barges lying at the usual barge-moorings in the river above Barking Creek shall not be required to exhibit such riding light."

(3) Lush. 382.

1888

THE INDIAN CHIEF.

Butt, J.

and inconvenience to other craft if a barge, such as this, does not carry side lights. It appears to me that there is no more risk or inconvenience than if she did. If she were carrying side lights as she was dredging down the river, vessels going the same way would suppose that she was a sailing-vessel coming towards them, and not, what in fact she was, a dumb barge going from them. I am also of opinion that the *Marian* was not a vessel at anchor within the meaning of rule 7. That being so, no light is prescribed by the rules to be carried by a vessel in her position, and the Elder Brethren advise me that she could not do better than carry the light which she did. I am further of opinion that if there had been a proper look-out on the *Indian Chief* the barge would have been seen at a much greater distance, and the collision might thus have been avoided. I hold the *Indian Chief* alone to blame for this collision.

Solicitors for plaintiff: *Lowless & Co.*

Solicitors for defendant: *J. A. & H. E. Farnfield.*

E. S. R.

Oct. 24; *Nov.* 19, 23, 30.

[IN THE COURT OF APPEAL.]

FIELD *v.* FIELD.

Divorce—Restitution of Conjugal Rights—Practice—Divorce and Matrimonial Causes Rules and Regulations, 1866, *r.* 2—*Additional Rules and Regulations*, 1875, *r.* 175—*Written Demand for Cohabitation and Restitution of Conjugal Rights.*

In a suit for restitution of conjugal rights the "written demand for cohabitation and restitution of conjugal rights" referred to in rule 175 need not necessarily be made by the petitioner, but may be made by a solicitor on behalf of the petitioner.

A wife cannot take proceedings for the restitution of conjugal rights until she has used reasonable means to induce her husband to take her back, and although the "written demand" to be made before the filing of the petition need not be in any particular form, it must be of a conciliatory character.

Where therefore a formal letter was written by the petitioner's solicitor on her behalf, demanding restitution with a threat of legal proceedings in default, and it did not appear that there had been any previous friendly communications upon the subject between the parties:—

Held, that such letter was not a proper "written demand" within rule 175.

This was a petition by Mary Francoise Baron Field for the restitution of conjugal rights by her husband, John Kingsford Field. The Divorce and Matrimonial Causes Rules and Regula-

tions, 1886, provide in rule 2 that with every petition before the Court there is to be filed an affidavit made by the petitioner verifying the facts of which he or she has personal cognizance, and deposing as to belief in the truth of the other facts alleged in the petition.

Rule 175 of the Additional Rules and Regulations, 1875, is as follows:—"The affidavit filed with the petition, as required by r. 2, shall further state sufficient facts to satisfy one of the registrars that a written demand for cohabitation and restitution of conjugal rights has been made by the petitioner upon the party to be cited, and that after a reasonable opportunity for compliance therewith such cohabitation and restitution of conjugal rights has been withheld."

The petition stated that the parties were married in May, 1877, and cohabited together and had children, and that in June, 1887, owing to the husband's poverty and inability to provide a home for his wife and children, she took a situation as private secretary; but that since March, 1888, his circumstances had improved, and he was living in a comfortable house, and yet, although applied to, he had refused and still refused to receive the petitioner back and to render to her conjugal rights.

The affidavit filed with the petition, and made by the petitioner, after verifying and deposing to the allegations in the petition, stated as follows:—"On the 14th day of June last I caused a written notice to be sent to the said John Kingsford Field demanding forthwith cohabitation and restitution of conjugal rights, and of which the following is a copy:

"55, Lincoln's Inn Fields, London,
"14 June, 1888.

"Dear Sir,—We are instructed by your wife, Mary Francoise Field, of South Villa, Wells Road, Great Malvern, to demand for her forthwith cohabitation and restitution of conjugal rights, and in default of your complying with this request we shall be compelled to institute proceedings for the same without further notice.

"Yours truly,
"Crowders & Vizard.

"John Kingsford Field, Esq.
"Lombard Road, Battersea, S.W.

1888

FIELD v. FIELD.

"The said John Kingsford Field has not complied with such request, and cohabitation and restitution of conjugal rights are still withheld."

This letter was sent by post as a registered letter to the above address.

The registrar was satisfied under rule 175 with this affidavit, and allowed the petition to be filed, and it was filed and personally served upon the respondent at the address to which the letter was sent on July 8, 1888, but he had not appeared nor filed any answer to the petition.

The petition came on as an undefended case before Butt, J. on October 24, 1888.

BUTT, J. Is this affidavit sufficient? Rule 175 expressly states that the demand must be made by the petitioner, and according to this affidavit it was made by the petitioner's solicitors.

Barnard, for the petitioner. Rule 175 has been substantially followed. The petition which has been served on the respondent is of itself a demand and he has not complied with it.

BUTT, J. The demand required by the rule must be made before the commencement of the suit. The invariable practice has been to require that the demand shall be made by the petitioner, as the language of the rule seems to me to contemplate. The affidavit in my opinion is not sufficient, and I shall not make a decree upon it, but I will let the case stand over for a short time to allow you to amend the defect.

B. Deane on a subsequent day applied for further directions. Lord Penzance, who framed the rule, held in an unreported case that demand by the petitioner's solicitors was sufficient, although since then the President has required that the demand should be made by the petitioner in person.

BUTT, J. If I am placed between two authorities, I shall follow the latter, as I think it is of importance that the demand should be made by the petitioner, and that that is the meaning of the rule. The petition will be dismissed.

W. L.

The petitioner appealed.

1888

FIELD v. FIELD.

Bargrave Deane, for the petitioner. There is nothing in the language of rule 175 making it necessary that the demand should be actually written by the wife herself. The demand must be in writing, and may be by or on behalf of the petitioner; and the husband is protected by the requirement that it is to be such a demand as to satisfy the registrar, and here the registrar was satisfied. The rule only adopted a practice authorized by Lord Penzance: *Steel* v. *Steel* (decided in chambers); and the defect, if any, was cured by the personal service of a signed petition.

There is, in fact, no authorized form of demand. This being an undefended suit, it was only necessary for the petitioner to prove, as she has done, the marriage, the making of the demand, and the non-compliance therewith: *Pearson* v. *Pearson*. (1)

[COTTON, L.J. The ground of the decision in the Court below may have been that there was not sufficient evidence of any refusal by the husband before the filing of the petition to restore conjugal rights.]

The only ground taken by the learned judge was that the demand had not been made by the petitioner herself.

Cur. adv. vult.

1888. Nov. 23. COTTON, L.J. This is an appeal from a decision of Butt, J., dismissing a petition presented by a wife for the restitution of conjugal rights. It appears that the ground of the decision was the insufficiency of the affidavit filed with the petition. [The Lord Justice read rules 2 and 175 of the Divorce and Matrimonial Rules and Regulations, and continued:—] The demand for the restitution of conjugal rights, which is said to have been made on the husband, was contained in a letter written by the solicitors of the wife to the husband in the following terms. [The Lord Justice read the letter, and continued:—] Butt, J., appears to have thought that it was the established practice and rule of the Court to require that the written demand mentioned in rule 175 should be made by the wife herself. But upon inquiry we find that such is not really the case; and in my opinion, upon the true construction of rule 175, it is not necessary that the demand should be actually

(1) 33 L. J. (P. & M.) at p. 156.

1888

FIELD v. FIELD.

Cotton, L.J.

written by the person seeking restitution of conjugal rights. There is nothing in rule 175 to render that imperative, and in my opinion it would be a wrong construction of the rule so to read it. We think, therefore, that the rule laid down in the court below was erroneous, and that the ground on which the learned judge refused to make an order was wrong. But although this is so, I am by no means satisfied with the particular written demand made in the present case; and if the registrar who read this demand had said that he was not satisfied with it, I should have considered that he had acted more wisely in the matter than he has done. I think a petition should not be received unless a primâ facie case is shewn which would justify the Court in making the order sought. It is all very well to say that the case may be proved afterwards; but it must be shewn that there has been a refusal of the husband to take back the wife; and although the letter seeking the restitution of conjugal rights need not be written by the wife herself, and may be written on her behalf, yet, speaking generally, it ought to be a conciliatory letter, such as would be likely to lead to a friendly reconciliation between husband and wife—a letter making it known to the husband that the wife was willing and anxious to come back to him, and not a formal solicitor's letter like this, saying, "If you don't comply with our request, we shall take proceedings against you." No doubt under some circumstances, as, for instance, when there had been previous friendly negotiations on the subject, a formal letter like this might be sufficient. I do not propose to lay down, and in fact I decline to lay down, any hard and fast rule as to the particular form of the demand or the affidavit. The former must in each case depend upon the particular circumstances; but speaking generally, in the absence of any previous friendly communications, the letter should state in a friendly way that the wife desires to return to her husband's home, and should ask her husband to allow her to do so, and should not be simply a solicitor's letter threatening the husband with legal proceedings.

Then, again, there is another very serious defect in this affidavit of the petitioner. There is nothing in it shewing that this letter, such as it was, ever reached the husband's hands. All that she

says is this: "On the 14th day of June last I caused a written notice to be sent to the said John Kingsford Field demanding forthwith cohabitation and restitution of conjugal rights, and of which the following is a copy."

Of course the wife, or whoever wrote the letter to the husband, may say, "I posted the letter, and believed that it was received by him;" and in this case it was said that this letter was sent to the place where the husband was afterwards served with the petition. It may be so, but it is not in the affidavit.

Now what ought we to do? Under the circumstances we think that we ought to allow the petition to be restored to the paper to be heard before us, so as to give an opportunity to the petitioner to produce further evidence to shew that before the filing of the petition she had, in fact, made a request to the husband to grant her restitution of conjugal rights, and that after a reasonable opportunity for compliance with that request, restitution has in fact been withheld.

The old practice was to allow an order to be made, as of course, where the husband did not appear, but that practice was altered, in my opinion quite rightly, by Lord Penzance, and I think that we ought not to make an order unless the wife proves such facts as to justify us in so doing.

LINDLEY, L.J. I am of the same opinion, and have nothing to add except a word or two as to the form of the letter. The solicitors who acted for the petitioner, and wrote that letter, have no doubt followed the words of rule 175, but they have entirely missed the spirit of that rule. The letter seems to me to defeat the very object of the rule, which contemplates a conciliatory letter, and not a challenge.

BOWEN, L.J. I agree. I wish it to be understood that a cut-and-dried form of letter ought not to be used for all cases. The registrar should in each case bring his mind to bear upon the question whether there has been a reasonable demand. The form may vary according to the position of the matrimonial dispute. If it has assumed a particular aspect, it may be wound up by a letter in one shape, which would be wholly inappropriate if the dispute were of a different character.

1888

FIELD v. FIELD.

1888. Nov. 30. The case was mentioned again. The clerk of the petitioner's solicitors was examined, and proved the sending of a registered letter to the respondent, being the letter referred to above, and also that the respondent had admitted to him by word of mouth that he had received it. No attempt, however, had been made to obtain production of the original of the letter, nor was there any evidence adduced of any previous application by the wife to the husband.

Bargrave Deane, for the appellant.

[COTTON, L.J. Nothing is proved but that the respondent received a lawyer's letter, the contents of which are not in evidence, and you do not prove any other communication.]

The petitioner ought not to be put to begin again, when the respondent might have applied to stay proceedings under rule 176, and has not chosen to do so.

COTTON, L.J. I am of opinion that the petitioner has not made out a case for a decree, and that it ought to be shewn that before proceedings were commenced there was a case which would justify a decree. We said on the former occasion that there ought to be proof of a friendly application to the husband to take his wife back. Here we have no evidence of any friendly application. We only know this, that a lawyer's letter was sent, and that proceedings were commenced immediately afterwards. As we said before, if friendly applications were made before the lawyer's letter, that letter might be sufficient as a climax. As Lindley, L.J., forcibly observed, it would not do for some one to present a pistol at the husband's head, and say, "You must take your wife back." Here we have no evidence of any such communication as might have led to the wife being taken back in a friendly way.

LINDLEY, L.J. At one time I thought that materials for a decree might perhaps be found in this case. But when we find nothing but a lawyer's letter, I think that, though rule 175 has been followed in the letter, its spirit has been ignored. A wife cannot take proceedings until she has used reasonable means to induce

her husband to take her back. I think there is no hard and fast rule that the written application to take the wife back must be written by herself—she might have been a person who could not write. But there must be a friendly application, and not a hostile letter only.

BOWEN, L.J. This appeal, in my opinion, fails not on a technical point, but in substance. There is no evidence that the wife was willing to go back, and that the husband refused to take her. We have evidence that a registered letter was sent and received before the proceedings, but we have no proper evidence of its contents. The original has not been called for, so secondary evidence is not admissible, and we do not properly know what was in the letter. But taking the contents to be proved, it is still open to the objection that it was only a hostile lawyer's letter, not shewn to have been preceded by any friendly communication.

If we had given the petitioner a decree we should not under the circumstances have given her any costs, so she does not lose much by our dismissing the appeal. If she can make out any case for a decree, she must begin again.

Solicitors for the petitioner: *Crowders & Vizard.*

W. W. K.

1888
July 29.
1889
Feb. 6.

[IN THE COURT OF APPEAL.]

THE LONGFORD.

Collision—Action in rem—Notice of Action—City of Dublin Steam Packet Company—6 & 7 Wm. 4, ch. c. s. 8.

By 6 & 7 Wm. 4, ch. c. s. 8, no action shall be brought in which the City of Dublin Steam Packet Company shall be liable for any damage to any ship against such company, unless one month's notice in writing shall have been given to the company:—

Held, that the word "action" in s. 8 did not apply to an action in rem.

ACTION OF DAMAGE.

The plaintiffs were the owners of the steamship *Dublin*, and they sued the steamship *Longford* in an action in rem for the loss of the *Dublin* through a collision with the *Longford*. The owners of the *Longford* were the City of Dublin Steam Packet Company, and they appeared as defendants in the action. By paragraphs 1 to 6 inclusive of the statement of defence they pleaded that by statute (6 & 7 Wm. 4, ch. c. (local and personal), s. 8 (1)), they were entitled to one month's notice of action in writing, and that such notice not having been given to the company by the plaintiffs the latter could not proceed with the action.

The plaintiffs in their reply denied that the section in question had any reference to an action in rem.

(1) 6 & 7 Wm. 4, ch. c. (local and personal), s. 8: "And be it further enacted, that no action in any of His Majesty's Courts of Law to which the said company shall be liable in respect of any damage, injury, or trespass alleged to be done, committed or occasioned to, or against, any ship, lighter, barge, craft, wherry, or any kind of vessel on the high seas or in any river, port or harbour, or to or against any passenger on board any steam-vessel of the said company, or the owner, shipper, or consignee of any any goods, merchandizes, or baggage, shipped on board thereof, or to, or against any person or persons, property, goods, or effects whatsoever, shall be brought, commenced, or prosecuted against the said company, unless one calendar month's previous notice in writing shall have been given by the party or parties commencing such action to the said company; such notice to be given or left at the head or principal office of the said company, nor unless such action shall be brought or commenced within twelve calendar months next after the cause or causes of action shall have arisen in respect of which such action shall be brought or commenced."

By order of the registrar it was ordered that this question of law should be tried before the hearing on the facts.

Jan. 29. The question of law was argued.

Sir W. Phillimore, and *Carson*, for the defendants. The defendants are entitled to the notice of action mentioned in 6 & 7 Wm. 4, ch. c. s. 8, which applies to any action in which the company shall be liable for damage to a ship. Actions in rem are not expressly exempted from the operation of the section, which must therefore be taken to apply to them. Though the action was in form against the vessel, the owners are responsible for the damage, and this is substantially an action against the company.

[They referred to *The Parlement Belge* (1) and *The Druid.* (2)]

The Court of Admiralty in Ireland in *The Mullingar* (3) decided the present point contrary to the defendants' contention. That case cannot be supported on principle, and further, is not binding on this Court.

Barnes, Q.C., and *Hurst*, for the plaintiffs, were not heard.

BUTT, J. This is an action in rem, arising out of a collision which occurred on the high seas between the steamers *Dublin* and *Longford.*

The defendants have pleaded that this action cannot be maintained unless the plaintiffs gave one calendar month's notice of action, and it is not denied by the plaintiffs that such notice has not been given. The question is, whether this is an action against the company within the meaning of the section which has been referred to in the pleadings and arguments. It is not in name an action against the company, neither in my opinion is it in substance an action against the company, because it is clear that, in such an action as this, the claim against the ship may result in a judgment for a smaller amount than might be recovered against the company. Thus, the plaintiffs' vessel might be damaged to the extent of 1000*l.* The defendants' ship might be worth only 500*l.*, and so only 500*l.* could be recovered in an action in rem. The remedy against the ship is therefore not co-extensive with the remedy against her owners. This is a

(1) 5 P. D. 197 (217). (2) 1 W. Rob. 399.

(3) 1 Asp. Mar. L. C. (N.S.) 252.

1889

THE LONGFORD.

Butt, J.

section that ought to be construed strictly. I do not think that the legislature intended that the one month's notice should precede an action in rem, for the moment an injury has been wrongfully done to a vessel by collision on the high seas there arises a maritime lien on the vessel by which the damage has been done to secure an indemnity for the injured ship. The effect of holding that no action could be brought against a vessel belonging to this company without a month's notice might deprive the person in whose favour a maritime lien has arisen of his security. For the security of the ship may be lost or impaired in many ways. Before the month elapsed she might be lost at sea or be brought in by salvors with a lien taking priority, or she might be sent and kept beyond the jurisdiction. The legislature could scarcely have intended to deprive injured persons of the rights given to them by law.

The case of *The Parlement Belge* (1), which has been referred to, does not affect this case. The utmost which it decides is, that the owner of a ship may be, and is, indirectly impleaded in an action in rem. I therefore give judgment for the plaintiffs on paragraphs 1 to 6 of the statement of defence.

1889. Feb. 6. The defendants appealed.

Sir W. Phillimore, and *Carson*, for the appellants.
Barnes, Q.C., and *Hurst*, for the respondents, were not heard.

LORD ESHER, M.R. In this case the question is whether an action in rem is an action in one of Her Majesty's Courts of Law to which the City of Dublin Steam Packet Company is liable within the meaning of s. 8 of 6 & 7 Wm. 4, ch. c. The first point to be borne in mind is that the Act must be construed as if one were interpreting it the day after it was passed. It has been said that the Judicature Act must be looked to as evidence of of what the law was before it was passed; but that Act merely alters the procedure, and neither it, nor the existing forms which take their rise from it, are evidence of what the procedure was before it became law. We have also been referred to the case of *The Parlement Belge* (1), but the most that can be collected from

(1) 5 P. D. 197.

1889

THE LONGFORD.

Lord Esher, M.R.

that decision in reference to this case, is that an action in rem is not the same as an action in personam, though it may indirectly affect the owners of, or persons interested in the ship. The word "action" mentioned in the section in question was not applicable, when the Act was passed, to the procedure of the Admiralty Court. Admiralty actions were then called "suits" or "causes"; moreover, the Admiralty Court was not called and was not one of His Majesty's Courts of Law. It originally derived its jurisdiction from the Lord High Admiral and not from the King. But be that as it may, this is clearly not an action within the meaning of the word "action" in the section under notice. Most of the cases to which the section applies were not, when it was drawn, cases that could have come before the Court of Admiralty. It is necessary also, as Butt, J., did, and the judge of the Irish Court of Admiralty in the case of *The Mullingar* (1), to look at the effect of holding that an action in rem is within this section. To do so would render futile an action in rem against a ship belonging to this company, for the vessel might without difficulty be taken out of the jurisdiction of the Court before the one month's notice had elapsed. It has been said that the notice would enable the defendants to pay a sum of money into court, but unless the ship could be seized the plaintiffs could have no means of knowing whether the sum paid in was sufficient or not. It is clear, therefore, that an action in rem is not within this section. That action is now what it always was, except that the Judicature Act has slightly altered the procedure in regard to it. This appeal must, therefore, be dismissed with costs.

BOWEN, L.J. I am of the same opinion.

The first question is whether when this Act was passed this section was intended to include within its scope actions in rem or only actions in personam. If we were to consider that this section intends to prescribe that notice of action must be given one month before any suit in rem is brought in the Admiralty Court, two consequences would follow. In the first place, we should have to hold that a number of words here, which are perfectly

(1) 3 Asp. Mar. L. C. 252.

1889

THE LONGFORD.

Bowen, L.J.

intelligible in their ordinary sense are used in a distorted and unusual sense. The words are, "No action in any of His Majesty's Courts of Law to which the company shall be liable." We should have to apply the word "action" to a suit in the Admiralty Court, and to hold that it—the proper title of which is the High Court of Admiralty—was one of His Majesty's Courts of Law within the meaning of the section, when it was not a Court of Law at all. We should have also to hold that an action in rem, which really begins by proceedings against the ship, though they no doubt have the result of citing before the Court the owner of the ship in person, is an action in the ordinary meaning of the word, which can be prosecuted against the company; we should thus be doing violence to the language of the Act of Parliament, and we should involve the injured parties in the strange misfortune that they could not begin an an action in the Admiralty Court unless they gave a month's notice. This would practically make all actions in rem against vessels of this company useless, if not impossible. It has been argued that the Judicature Act has made a difference in the law, but it has done no such thing; it has not made an action in rem an action in personam, it has only modified some of the procedure at the beginning of an action in rem. They are now as before that Act distinct kinds of actions.

FRY, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Pritchard & Sons.*
Solicitors for defendants: *Carlisle, Unna, & Rider.*

E. S. R.

IN THE GOODS OF BATTERBEE. 1889

Feb. 5.

Will—Surviving Executor resident out of the Jurisdiction—Sole Legatee a Minor —Renunciation of Next of Kin—Grant under s. 73 of Probate Act (20 & 21 *Vict. c.* 77) *to Testamentary Guardian not otherwise entitled.*

Upon an application for administration with the will annexed it appeared that the testator by his will had appointed two executors, and made his daughter, a minor, his sole legatee. Of the two executors one was dead, and the other at the time of testator's death was in Brazil, the date of his return being uncertain. The next of kin of the minor either renounced or were resident out of the jurisdiction.

The Court, upon proof that there was urgent need of immediate administration, made a grant to the paternal aunt of the minor, whom she had elected her testamentary guardian.

RANSOM COLECOMBE BATTERBEE, late of Buckingham Street, Adelphi, in the county of Middlesex, deceased, died July 5, 1888, leaving a will duly executed, bearing date March 2, 1882, by which he constituted his daughter Bessie Statham Batterbee his universal legatee, and he appointed Frank Watson and Francis Bridge Bloxham his executors.

Frank Watson died July 8, 1882, and the other executor, F. B. Bloxham, at the time of testator's decease was travelling in Brazil, engaged in the inspection of certain branches of the English Bank of Rio Janeiro.

Bessie Statham Batterbee, the testator's daughter and sole legatee, was a minor, and her next of kin, her paternal grandmother, was eighty-four years of age, and being unable to take the grant had renounced. Her father's only brother had been resident in Australia for more than thirty years.

The principal asset of the testator's estate was a reversionary interest in a sum of consols which had been mortgaged. The interest on the mortgage was running on, as there was no income arising from the estate which could be applied to the payment of it, and the mortgagee had given notice to foreclose.

Application had been made for a grant of administration under the 73rd section to Mrs. Brewer, a paternal aunt of the universal legatee, but the Court declined to make it on the materials then brought before it, and

1889

IN THE GOODS OF BATTERBEE.

Searle, now renewed the motion on affidavits that the minor had elected Mrs. Brewer to be her curator or guardian for the purpose of taking the grant, and that Mr. Bloxham was resident in Brazil at the time of testator's death, and that the date of his return to this country was uncertain.

BUTT, J., made the grant as prayed.

Solicitor: *H. R. Cobb.*

W. L.

Jan. 27.

IN THE GOODS OF A. PAXTON.
IN THE GOODS OF D. BENNISON.
IN THE GOODS OF H. BENNISON.

Administration—Chain of Representation—Estate administered in Chancery Division—Reduction of Amount of Administration Bond.

Where an estate was being administered in the Chancery Division and an order had been made that each individual share of the estate should be paid directly to the parties entitled, this Court allowed the penalty of the administration bond to be limited to double the amount of the beneficial interest of the applicant.

THIS was an application to dispense with sureties to administration bonds under the following circumstances:—

Elizabeth Bennison, the applicant, was the widow of Henry Bennison, late of Hoxton, in the county of Middlesex, who died on August 8, 1878, intestate. He had for his first wife Dorothy Isabella Bennison, who died in 1861, intestate, and no administration was taken out to her estate by her husband. She was one of two grand-nieces of Andrew Paxton, who died in 1861, intestate, and neither Dorothy Bennison nor the other grand-niece, Jane Williams, took out letters of administration to his estate. Under the will of Jane Partridge, Andrew Paxton was entitled to one moiety of a share of her estate, which moiety, deducting certain incidental charges, was of the value of 2500*l.*, or thereabouts.

The estate of Jane Partridge was being administered in the Chancery Division, and Mrs. Bennison having taken out letters of administration to the estates of Henry Bennison, Dorothy Bennison, and Andrew Paxton severally, the Chief Clerk in

1889

IN THE GOODS OF A. PAXTON.
IN THE GOODS OF D. BENNISON.
IN THE GOODS OF H. BENNISON.

June, 1888, made a certificate allowing her claim as the administratrix and legal representative of these three deceased persons. On July 7, 1888, North, J., acting on this certificate, found that Elizabeth Bennison, as administratrix of the said Andrew Paxton, was entitled to one moiety of a share in the estate of Jane Partridge, the other moiety going to Jane Williams. As all the parties entitled to the various shares were in poor circumstances, and a difficulty might arise in respect to administration duties, North, J., directed that each individual share should be paid directly to the parties entitled, and not through the administratrix.

The share of Andrew Paxton's estate, of which Mrs. Bennison was administratrix, was divisible into fourteenths, of which she took seven, amounting to 600*l.* or thereabouts, and

Middleton, now moved on her behalf to dispense with justifying securities to the three grants which she had taken out. No part of the fund will come into her possession except the share which is to be transferred to her under the order of the Chancery Division, and there is therefore no risk of injustice to future claimants or to possible creditors.

BUTT, J. I understand that the President is always averse to dispensing with justifying securities, and I quite agree with him. But under the circumstances, as the estate is being administered in the Chancery Division, I will allow the security to be limited to twice the amount of the applicant's beneficial interest.

[On the question of costs of the motion, the Court gave leave to the parties to make application in the Chancery Division.]

Solicitors: *Chester & Co.*

W. L.

1889
Feb. 20.

[IN THE COURT OF APPEAL.]

IN RE GOODS OF JOHN PATRICK, DECEASED.

Probate—Practice—Appeal from Registrar—Time for appealing—Rules of Supreme Court, Order LIV., *rr.* 12, 21.

The time for appealing from an order made by a registrar of the Probate Division is the same as that limited by Order LIV., r. 21, for appealing from an order of a master: viz. four days from the decision, although a registrar is not mentioned in that rule.

Decision of Butt, J., affirmed.

APPEAL from an order of Butt, J., refusing to entertain an appeal from the registrar.

It appeared that J. T. Patrick died without issue and intestate, leaving a widow who was a lunatic. His sister applied for letters of administration, but a caveat was entered on behalf of the widow, and on November 28 a notice of motion was served for a grant of letters of administration to the committee for the use and benefit of the widow. This motion came before Butt, J., on December 11, and he referred it to the registrar.

On December 17 the case was argued by counsel before the registrar, who made an order that letters of administration should be granted to the committee for the use and benefit of the widow.

On December 24 the sister gave notice of motion that the registrar's order might be set aside and administration granted to the sister.

Butt, J., in chambers, refused to entertain the appeal on the ground that it had not been brought within four days.

The sister appealed.

Cozens-Hardy, Q.C., and *Cranstoun*, for the appellant. Butt, J., treated the case as governed by Order LIV., r. 21, but the rule does not apply to the Probate Division. The rules of Order LIV. mention a registrar as distinct from a master, and the provisions as to one do not therefore apply to the other. There is nothing, therefore, to require the appeal to be brought within

four days. It was laid down in *In re Smith, Rigg* v. *Hughes* (1), that the rules of the Chancery Division should be followed as to appeals from orders made in chambers by a judge of the Probate Division. This does not decide the point, but it would be singular if appeals from a judge in chambers were to be subject to one rule, and appeals from a registrar who has the same jurisdiction as a judge in chambers, to another. The rule laid down by Pearson, J., Annual Practice, 1888–9, p. 735, is that where the chief clerk decides a point without any adjournment to the judge being asked for, the order can only be altered by motion to discharge. The rules prescribe no time within which such motion must be brought, but the period of twenty-one days has been adopted by analogy to Order LVIII., r. 15: *Heatley* v. *Newton*. (2) So here, there being no express direction that the appeal shall be brought within four days, the period of twenty-one days should be allowed according to the analogy of the practice in the Chancery Division.

[LINDLEY, J. Is this an order made by the registrar in his own name or in the name and on behalf of the judge?]

It is an order made by him in his own name.

Inderwick, Q.C., and *Lipscombe*, for the widow. It has been the practice in the Probate Division to treat Order LIV., r. 21, as governing appeals from a decision of a registrar in the Probate Division, as well as appeals from a master in the Queen's Bench Division. Unless this rule applies, the orders do not provide for any appeal at all. The registrar is in the position of a master, not of a chief clerk, and if the case is to be governed by analogy, that of rule 21 is the correct analogy.

Cozens-Hardy, Q.C., in reply. The definition of "master" in Order LXXI. does not include a registrar, and no instance where it has that sense can be pointed out in the rules. Under the old practice there always was an appeal, and it cannot be contended that there is none now. The registrar makes orders in the same way as under the old practice.

COTTON, L.J. This is an appeal from a decision of Butt, J., refusing to entertain an appeal as being out of time. There is

(1) 9 P. D. 68. (2) 19 Ch. D. 326.

1889

IN RE GOODS OF JOHN PATRICK.

Cotton, L.J.

some difficulty in the point. Order LIV., r. 12 provides that "in the Queen's Bench Division a master, and in the Probate, Divorce and Admiralty Divisions, a registrar, may transact all such business, and exercise all such authority and jurisdiction in respect of the same, as under the Acts or these rules may be transacted or exercised by a judge in chambers, except in respect of the following proceedings and matters," and then follows a list of exceptions which do not apply to the present case. It therefore cannot be held that the registrar had no jurisdiction to make the order which he made. The appeal to Butt, J., was from that order of the registrar. Now Order LIV., r. 21, provides for an appeal from any order or decision of a master, not mentioning a registrar, and requires the appeal to be brought within four days. It appears that the practice in the Probate Division has been to treat appeals from the registrar as governed by that limitation as to time. That practice appears to be a reasonable one, for, unless it be adopted, the rules do not fix any limit of time at all for appeals from the registrar. I cannot say that the rules in this respect are happily framed, but I think that the view which has been taken in the Probate Division is the reasonable one.

LINDLEY, L.J. I am of the same opinion. The rules do not in terms fix any time for appealing from an order of a registrar. But Order LIV., r. 12, shews that the registrars are not, like chief clerks, deputies of the judge, but have a position like that of the masters, so that their orders are not made on behalf of the judge, but are orders which, in the strict sense of the word, are appealable. I think, therefore, that, by analogy, the rule to be adopted is rule 21, applicable to the masters, and not the rules applicable to chief clerks in the Chancery Division. The practice which has prevailed in the Probate Division ought, therefore, not to be disturbed.

LOPES, L.J. There is some difficulty in the wording of the rules. Order LIV., r. 12, mentions the registrar, and puts him in the same position as a master, and under that rule he had jurisdiction to make the order which he made in this case. Then

1889

IN RE GOODS OF JOHN PATRICK.

Lopes, L.J.

Order LIV., r. 21, provides for an appeal from the master and limits the time within which it must be brought, but does not mention the registrar. Then Order LXXI., says that "master" means a master of the Supreme Court of Judicature. We are informed that the practice in the Probate Division has been to treat appeals from the registrar as included in rule 21. There appears to have been a slip in framing the Orders, but I think it must have been intended that "master," in that rule should include the registrar, and in my opinion the practice ought not to be disturbed.

Appeal dismissed.

Solicitors: *S. S. Seal; Allen Woodroffe.*

H. C. J.

IZARD *v.* IZARD AND LESLIE.

Feb. 13, 14.

Divorce—Husband and Wife living apart under Separation Deed—Subsequent Adultery—Effect of Separation Deed on the Amount of Damages.

In a petition by the husband for dissolution of marriage claiming damages, it appeared that the petitioner and his wife had entered into a separation deed in consequence of her intimacy with the co-respondent, and that she committed adultery with him after the date of the deed.

Held, that the petitioner was entitled to the same amount of damages as he would have been had no separation deed been executed.

THIS was a petition by the husband for the dissolution of the marriage on the ground of his wife's adultery with the co-respondent; and damages were prayed.

The petition was heard before Butt, J., and a special jury.

Willis, Q.C., (*Searle*, with him), for the petitioner.

Lockwood, Q.C., (*Middleton*, with him), for the co-respondent.

The respondent did not appear.

The parties, who were members of the theatrical and musical professions, were married in December, 1885, and cohabited at Brixton until the end of 1887; and subsequently at Carlisle Mansions, Westminster. They lived happily until early in 1888, when the petitioner heard reports as to the relations between his wife and the co-respondent, who was lessee of the theatre at which she acted, which induced him to speak to his

1889

IZARD v. IZARD.

wife, but he was assured both by her and the co-respondent, who sought an interview with him on the subject, that there was no foundation for the reports. On the strength of these assurances the petitioner did not insist on all social intercourse being broken off; but in April, 1888, the respondent confessed that she no longer loved the petitioner, and could not live with him as she loved the co-respondent; but she assured him that no criminal intercourse had occurred between them. After this date the petitioner and his wife ceased to occupy the same bedroom, and in June, 1888, after the petitioner had made several unavailing attempts to effect a reconciliation with his wife, a deed of separation was executed. In the autumn respondent and co-respondent went to America, where it was admitted they had lived as man and wife; and an act of adultery was also proved at an hotel in London in August, 1888. Evidence was also tendered of familiarities and other circumstances from which the jury might infer that adultery had occurred before the separation deed was executed, but Butt, J., ruled that it was unnecessary, as it ought to have no effect in assessing the amount of damages.

In directing the jury,

BUTT, J., said:—It has been suggested that where a husband and wife have by deed agreed to live apart, and do live separate and apart from one another, if the wife commits adultery that deed is a bar to the recovery of any damages by the husband. If that has ever been said I think it is wrong. (1) There may be

(1) In *Weedon* v. *Timbrell* (5 Term Rep. 357) it was held that no action for crim. con. could be brought for any adultery after a separation between husband and wife. And in *Winter* v. *Henn* (4 C. & P. 499), Alderson, B., directed the jury that if the plaintiff, before the adultery, had permanently given up all intention of living with his wife, he could not set up the loss of what he had voluntarily relinquished as the ground of a claim for compensation. See also *Bartelot* v. *Hawker* (Peake's Cas. 11), and *Hodges* v. *Windham* (ib. 53). But in *Chambers* v. *Caulfield* (6 East, 244), Lord Ellenborough, while distinguishing the case from *Weedon* v. *Timbrell*, on the ground that the wife was not living separate with the leave of her husband, or at least of the trustees, said he did not consider that the general point was concluded whether the mere fact of a separation between husband and wife by deed was such an absolute renunciation of his marital rights as precluded the husband from maintaining an action for the seduction of his wife. In *Malcomson* v. *Givins* (reported only in the *Times*, February 27, 1873),

cases in which it is either an absolute bar, or may be held to reduce damages to the smallest possible amount. The amount of injury suffered is the pecuniary injury to the husband. It must be obvious to anyone that if a husband and wife have consented to live separately, and have, in fact, lived separately for a number of years, the injury to the husband would be compensated by the smallest amount of damages. But each case varies with the different circumstances of life, and I have no hesitation in telling you that if a man makes the acquaintance of another man's wife, engages her affections, and is the cause of her separation from her husband, and then, after such separation, commits adultery with her, the husband is entitled to the same amount of damages as he would have been entitled to if no separation deed had been executed between them, and that even if no adultery had been committed before the separation.

The jury found that the respondent and the co-respondent had committed adultery, and assessed the damages at 5000*l.*

THE COURT granted a decree nisi, and ordered the damages to be paid to the petitioner within a fortnight.

Solicitors for petitioner: *Lewis & Stokes.*

Solicitor for respondent and co-respondent: *G. H. Carthew.*

---

the Judge Ordinary (Sir J. Hannen) on the authority of *Weedon* v. *Timbrell* and *Winter* v. *Henn*, dismissed a petition for damages by a husband who was separated from his wife by deed at the time of the adultery. But in the proceedings on Malcomson's Divorce Bill in the House of Lords, Lord Chelmsford (ex rel. Searle) said their Lordships must not be assumed to assent to the doctrine that damages could not be recovered where the adultery was committed while the husband and wife were living apart.

W. L.

1889
Jan. 15.

IN THE GOODS OF COLYER.

Probate—Will—Execution in the form of a Deed—Attesting Witnesses unable to recollect the Circumstances of Execution.

Probate granted of a will executed in the form of a deed, although the attesting witnesses had no precise recollection of the circumstances of the execution.

THE Rev. John Edmeades Colyer, M.A., rector of Astbury, in the county of Chester, left a will, holograph and undated, which was executed in the following form:—

Signed, sealed, and delivered by the aforesaid John Edmeades Colyer in the presence of

G. W. Hunt,
Clerk in holy orders,
Curate of Astbury.
Charles P. Percival,
Schoolmaster,
Astbury.

} John Edmeades Colyer.

L. S.

The attesting witnesses had made affidavits in which they recognised their signatures and the signature of the testator, but neither of them was able to give any positive testimony as to the circumstances of the execution. Mr. Hunt said he had some slight recollection of the testator asking him to witness his signature to a document, but he did not know what the document was, nor whether the other witness was present at the time. Mr. Percival said the deceased was frequently in the habit of asking him to attest his signature to documents, but that he had no special recollection of this document, nor did he remember ever being told that he was witnessing a will, nor could he remember whether the other witness was present when he signed.

Bayford, Q.C., moved for probate.

BUTT, J. I think I may act here on the presumption omnia esse rite acta, and the grant may go.

Solicitors: *Dixon, Ward, & Co.*

W. L.

TRELOAR *v.* LEAN AND OTHERS. 1889
Feb. 25.

Probate—Will—Partial or Total Revocation.

A testator after duly executing his will, which was in five sheets, each of which was signed by himself and initialled by the attesting witnesses—took out three sheets and substituted three new ones—which he signed, but which were not attested. He did not alter the date of the will, nor did he re-sign it, nor was it re-attested :—

Held, that the will was not entitled to probate.

THE testator, William Treloar, some time in August, 1878, having prepared a draft of his last will and testament, handed it to Mr. J. Willey, a solicitor's clerk, asking him to make a fair copy of it. This, Mr. Willey did, and gave him back the fair copy and the original draft. On August 21, 1878, the deceased executed the fair copy in the presence of two witnesses, Thomas Williams and Richard Reid. The will consisted of five sheets, and Thomas Williams, one of the attesting witnesses, the other being dead, stated that the testator signed each sheet, and that he and the other attesting witness initialled each sheet of the will.

The testator died on April 19, 1888, and after his death, search being made for his will, the document now propounded was found by the testator's second son in an iron box belonging to the testator, in an envelope indorsed in the handwriting of the deceased. In the document thus discovered, the last, or fifth, sheet of the original will, executed August 21, 1878, which was in the handwriting of Mr. Willey, came first, then the back sheet of the will, then sheet No. 4 of the original will, also in Mr. Willey's handwriting, and then three sheets in the testator's handwriting. These three sheets were signed by Mr. Treloar, but not initialled by the witnesses.

Some time in the year 1882 it appeared the testator, having purchased some freehold property since the date of his will, desired to revise it, and he must have taken out three sheets of the original will and substituted for them three sheets in his own handwriting, but he had not altered the date of the original will, nor had he re-signed it nor had it been re-attested. The original

BIBL. LONDIN UNIV.

1889

TRELOAR v. LEAN.

three sheets could not be found, and the surviving attesting witness stated that he had attested no other will for the deceased.

The plaintiff, a son of the deceased, prayed that the document might be declared invalid, and that administration might be granted as in case of an intestacy. The defendants, who were executors of the original will, propounded it for probate.

Middleton, for the plaintiff.

B. Deane, for the defendants.

[*Woodward* v. *Goulston* (1); *In the Goods of Woodward* (2), and *Clarke* v. *Scripps* (3) were referred to.]

BUTT, J., held, that the will was not entitled to probate, and (with the consent of all parties interested) pronounced for an intestacy.

Solicitors for plaintiff: *Rowcliffes, Rawle & Co.*

Solicitors for defendants: *Stephen & Day.*

W. L.

March 1, 2.

[IN THE COURT OF APPEAL.]

THE VINDOBALA.

Ship—Co-owners—Arrest of Chartered Ship—Damages—Sale—Liability of Purchaser—Liability of Trading Owners.

THIS was an appeal from the first part only of the judgment of Butt, J., reported 13 P. D. 42. The Court of Appeal reversed the judgment of Butt, J., on this point, viz., whether the defendants were bound by a charterparty signed by the managing owner of the *Vindobala*. The judgment turned on the facts and the construction of various letters and telegrams, and did not touch the points of law decided by Butt, J.

E. S. R.

(1) 11 App. Cas. 469. (2) 2 P. D. 206.

(3) 2 Rob. 563.

[IN THE COURT OF APPEAL.]

1889
March 26, 27.

THE MONKSEATON.

Practice—Costs—Inevitable Accident.

In an action for damage by collision in which the defence was inevitable accident, the plaintiffs obtained judgment on the ground that negligence on the part of the defendants had been proved.

On appeal to the Court of Appeal, the defence of inevitable accident was established, and the judgment reversed:—

Held, that as the Admiralty Court is a division of the High Court of Justice, the general rule, in force in the other Divisions—that, in the absence of special circumstances, costs follow the event—ought to be followed in that court, and that on the appeal being allowed, the defendants were entitled to the costs both of the appeal and in the court below.

APPEAL by the defendants, the owners of the steamship *Monkseaton*, from a judgment of the President finding that vessel alone to blame for a collision with the plaintiffs' steamship, the *Spearman*.

The facts, so far as material for this report on the question of costs only, were as follows: On February 9, 1888, the *Spearman* was lying at anchor in the River Tagus, when the *Monkseaton*, having broken from her moorings, ran into and sank her. In an action of damage in the Admiralty Division, the defendants pleaded that the collision was caused by the *Spearman* breaking adrift from her moorings, or by the buoy to which the *Monkseaton* was moored breaking adrift, and that, so far as the defendants or their servants were concerned, it was an inevitable accident.

The defendants subsequently abandoned that part of their defence which alleged that the *Spearman* had broken from her moorings, and they produced the shackle of the buoy to which the *Monkseaton* had been moored, shewing a defect at the place where it had broken.

The President gave judgment for the plaintiffs on the ground that an excessive strain had been brought upon the shackle by the negligence of those in charge of the *Monkseaton* in allowing her unduly to sheer.

The defendants appealed.

1889

THE MONKSEATON.

The Court of Appeal allowed the appeal, holding that the way in which the *Monkseaton* was moored negatived the alleged undue sheering, and that the collision was caused by the breaking of the shackle without negligence on the part of the defendants.

Myburgh, Q.C., and *Batten*, for the plaintiffs, on the question of costs, contended that the defendants, though they had succeeded on the appeal, were not entitled to costs.

It is the practice in Admiralty, when the defendants have succeeded on the ground of inevitable accident, to dismiss the action without costs, when, having regard to the circumstances, it cannot be said that the action ought not to have been brought: *The Buckhurst.* (1) The present case disclosed such circumstances, for by the original defence the collision was alternatively alleged to have been caused by the *Spearman* breaking adrift from her moorings. This was not the fact, and this part of the defence was subsequently abandoned. It was also the practice of the Privy Council not to allow costs in cases where the decision of the Court of Admiralty pronouncing a vessel to blame was reversed on appeal, and the collision held to be an inevitable accident: *The Marpesia.* (2)

Sir W. Phillimore, Barnes, Q.C., and *Baden Powell*, for the defendants, the owners of the *Monkseaton*. In *The Condor* (3) the Court of Appeal intimated that in future the costs in Admiralty appeals would follow the event, and James, L.J., pointed out the inconvenience of there being a different rule on the subject of costs in one branch of the Court to that obtaining in the other branches.

March 27. LORD ESHER, M.R. Under the Judicature Acts the Court of Admiralty has become a division of the High Court of Justice. There should be a uniform practice in all the divisions of the Court on the subject of costs. The existing rule in all other branches of the High Court is that, in the absence of special circumstances costs follow the event. In this case the defence relied on from the first was inevitable accident. There are here no special circumstances requiring a departure from the

(1) 6 P. D. 152. (2) Law Rep. 4 P. C. 212.
(3) 4 P. D. 115.

above-mentioned rule; therefore the defendants having set up the defence of inevitable accident, and having succeeded, on appeal, in establishing that defence, are entitled to the costs both in this Court and in the Court below.

1889

THE MONKSEATON.

FRY and LOPES, L.JJ., concurred.

Appeal allowed.

Solicitors for appellants: *T. Cooper & Co.*

Solicitors for respondents: *Waltons, Bubb, & Johnson.*

E. S. R.

[IN THE COURT OF APPEAL.]

March 25.

THE TASMANIA.

Collision—Sailing Rules—Regulations for Preventing Collisions at Sea, arts. 14 (*a*), 22, 23.

By the Regulations for Preventing Collisions at Sea, Art. 14: "When two sailing-ships are approaching one another so as to involve risk of collision, one of them shall keep out of the way of the other as follows, viz., (*a.*) A ship which is running free shall keep out of the way of a ship that is close-hauled."

Art. 22: "Where by the above rules one of two ships is to keep out of the way, the other shall keep her course." Art. 23: "In obeying and construing these rules due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

Two sailing-ships at night were approaching each other so as to pass port-side to port-side. The one whose duty it was to keep out of the way under art. 14 (*a.*) altered her course and began to come across the course of the other. The master of the ship whose duty it was, under art. 22, to keep her course, at a distance of a quarter of a mile saw the red light of the other ship shut in, and her green light come into view. He continued to keep his course till the other ship herself could be seen, when it was too late to avoid the collision, which immediately occurred:—

Held, by the Court of Appeal, reversing the decision of Butt, J., that the officer in charge of the ship which was primâ facie bound to keep her course should not have kept his course after he saw that the other vessel was going to cross his bows; and that art. 23 had then come into operation, and that therefore both ships were to blame for the collision.

APPEAL from a judgment of Butt, J., whereby he pronounced the plaintiff's vessel the *City of Corinth* to be alone to blame for a collision between that vessel and the *Tasmania*, which occurred about 7 o'clock P.M. on March 8, 1887, in the English Channel.

The *City of Corinth*, a sailing-ship, was coming up Channel

1889

THE TASMANIA.

with the wind free; the *Tasmania*, also a sailing-ship, was going down Channel close-hauled on the port tack, the wind being about S.W. She was, therefore, primâ facie bound to keep her course under art. 22. (1) The *City of Corinth* being bound under art. 14 (*a.*) to keep out of her way. The red light of the *Tasmania* was seen by the officer in charge of the *City of Corinth*, and those in charge of the *Tasmania* saw the red light of the *City of Corinth* about two points on their port bow, and apparently about a mile distant. Butt, J., held that it was established that the *City of Corinth* starboarded her helm and came across the course of the *Tasmania* and was therefore to blame. He further found as a fact that the *Tasmania* did not deviate from the course on which she was when the *City of Corinth* was first seen, and was therefore not to blame for the collision, which occurred by the *Tasmania* striking the *City of Corinth* on her starboard side just before the mainmast.

It was proved by evidence from the *Tasmania* that the captain saw the red light of the *City of Corinth* about two points on the port bow of the *Tasmania* about a mile or more distant. Then he saw the red light shut in and the green light come into view about four ships' lengths away, or a quarter of a mile distant. The master then called out to the second mate to send a man forward to look at the lights of the *Tasmania* and see if they were burning brightly. Next he called the second mate to come on the poop and see what the green light was going to do, and continued to watch the light until the ship herself came into sight, when he immediately ordered the helm hard down, all hands on deck, and the boats out, and the collision then at once occurred. During the above-mentioned occurrences the speed of the *Tasmania* was about three and a half knots an hour.

The plaintiffs appealed.

(1) Art. 14: "When two sailing-ships are approaching one another so as to involve risk of collision, one of them shall keep out of the way of the other as follows, viz.:—

(*a.*) A ship which is running free shall keep out of the way of a ship which is close-hauled."

Art. 22: "Where by the above rules one of two ships is to keep out of the way, the other shall keep her course."

Art. 23: "In obeying and construing these rules due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Sir R. E. Webster, A.G., *Hall, Q.C.*, and *Pyke*, for the plaintiffs.
Barnes, Q.C., and *Raikes*, for the defendant.

[The arguments of counsel turned chiefly on points other than that on which the judgment of the Court as regards the conduct of the *Tasmania* was based. It was contended in the court below and before the Court of Appeal that she had not kept her course, and after having improperly luffed up into the wind had got back to the heading at which she first sighted the *City of Corinth*.]

LORD ESHER, M.R. [The Master of the Rolls first decided that the *City of Corinth* had manœuvred wrongly, and then proceeded to the case of the *Tasmania*.] I now come to the case of the *Tasmania*. This vessel was bound by art. 22 of the Regulations for Preventing Collisions at Sea in the first instance to keep her course. She was bound to do so as long as the officer in charge of her was in doubt as to the manœuvres of the *City of Corinth*. But there came a time when the movements of the *City of Corinth* should have shewn a prudent officer that the *City of Corinth* was going to cross the bows of the *Tasmania*. When the officer of the *Tasmania* saw this he should no longer have kept on his course, for to do so was to increase the danger of collision. The action of the *City of Corinth* was so determinedly wrong that as soon as the captain of the *Tasmania* saw the green light of the *City of Corinth* he ought to have acted for her. In other words the course of the *Tasmania* should have been altered before it was; in this view our assessors concur. As a matter of fact, however, it is clear that the captain of the *Tasmania*, who was on the poop, sent a man the length of his vessel to see if the lights on his own vessel were burning brightly; this was a waste of time. After the man returned he still delayed taking any action, but called the mate to him. And it was not till after having done this that he gave the order to starboard. I will not enter into the question whether the mate interfered with the order—it is immaterial to do so. The captain did not act as soon as he should have done; he disobeyed art 23; it is impossible to say that this wrongdoing had no effect on the collision, and therefore I am of opinion that the *Tasmania* as well as the

1889

THE TASMANIA.

City of Corinth is to blame for this collision, and that the judgment of Butt, J., must be varied accordingly.

FRY, L.J. I concur. I feel the importance of not allowing trifling circumstances to cause a master to depart from any of the statutory rules. But in this case a number of circumstances occurred during which the master of the *Tasmania* should have applied his mind to the averting of the collision. When he did take action it was too late.

LOPES, L.J., concurred.

Appeal allowed.

Solicitors for appellants: *Gellatly, Son, & Warton.*
Solicitors for respondents: *Waltons, Bubb, & Johnson.*

E. S. R.

Jan. 19, 21, 22; *Feb.* 16, 18; *March* 10.

RIDING *v.* HAWKINS.

Probate—Amendment of Pleadings—Charge of Fraud after Case is closed.

In a probate suit where the onus of proof lay on the defendant, application was made by the plaintiff, after the defendant had been cross-examined and his case had been closed, for leave to amend the pleadings by adding a defence that the codicil in dispute had been obtained by the defendant's fraudulent misrepresentations, the evidence in support of such defence to be confined to matters arising upon the defendant's cross-examination :—

Held, that the amendment might properly be allowed.

THE testatrix, Mrs. James, died December 9, 1887, at the age of eighty-one, leaving a will and three codicils. By her will, executed December 21, 1878, and by the first codicil dated January 12, 1879, with the exception of certain legacies of no great amount, she bequeathed the bulk of her property to her only surviving child, Mrs. Riding, the plaintiff in this suit. By the second codicil, executed on December 13, 1884, she gave a legacy of 100*l.* to the defendant the Rev. Charles Frederick Bonny Hawkins; and by the third codicil, bearing date November 3, 1886, she bequeathed to the defendant certain shares in the Great Indian Peninsular Railway Co., then of the estimated value of 4500*l.*, but at the present time valued at over 6000*l.*

The plaintiff, as residuary legatee, propounded the will and the

first codicil, and the defendant propounded the second and third codicils, in opposition to which the plaintiff pleaded undue execution, testamentary incapacity, and that the execution of the codicils had been obtained by the undue influence of the defendant.

The suit was heard before Butt, J., with a special jury.

Sir E. Clarke, S.G. (*Inderwick, Q.C.*, and *R. H. Pritchard*, with him), for the plaintiff.

Bayford, Q.C. (*B. Deane*, with him), for the defendant.

The onus of establishing the two disputed codicils being on the defendant, his case was taken first, and from his evidence it appeared that he was introduced to the testatrix in 1880 at Folkestone, where he was a curate; that he was there a constant visitor at her house, and that he grew so much in her favour that she was accustomed to write to him as "my dear grandson." Later on, when he resigned his curacy and applied himself to literary work, he resided in her house in Wimpole Street whenever he was in town, and during the last years of her life he managed her household affairs, she having told her servants that they were to obey his orders as if he were the master of the house. In cross-examination, he was asked as to a diamond ring which the testatrix had given him, about which an anonymous letter had been written to her, but he denied that he had represented to the testatrix that this letter had been written by her daughter, the plaintiff. He also denied having told the testatrix that an offensive valentine, reflecting on the relations between her and the defendant, had been sent by the plaintiff, or that he had ever told the testatrix that "her family only visited her for what they could get out of her." He denied further that he had induced the testatrix to believe that he had been unfortunate in speculations, and had lost all his money, stating, on the contrary, that though he had made unprofitable investments, he had always told the deceased that his income was about 400*l.* a year.

Sir E. Clarke, S.G., in opening the plaintiff's case, said he should establish that the defendant had told deliberate untruths in the witness-box, and that he had obtained an undue influence over the testatrix, and had procured the execution of the third

1889

RIDING v. HAWKINS.

codicil by false statements to the deceased about her daughter and her son-in-law.

BUTT, J. If that is so, and if the defendant has obtained the execution of the codicil by false representations, that would not be what the law calls undue influence, but fraud.

Sir E. Clarke, S.G., thereupon applied for leave to amend the plaintiff's pleadings by adding a plea of fraud, limited, however, to those matters on which he had cross-examined the defendant.

Bayford, Q.C., submitted that it would be unfair to the defendant to amend the pleadings by adding such a charge as this after his case had been closed.

[BUTT, J. I should allow a postponement if you wished it.]

That would not remove the defendant's objection.

In the end the learned judge allowed the pleadings to be amended by adding a new plea (with particulars) "that the execution of the codicil of November 3, 1886, was obtained by the fraud and misrepresentation of the defendant," in regard to the four points mentioned above, viz. the anonymous letter, the valentine, the motives of the relations of the testatrix in visiting her, and the pecuniary circumstances of the defendant.

The jury found that the testatrix was of sound mind, memory, and understanding at the time of the execution of all the documents, and that they were all duly executed. They also found that the second and third codicils were not procured by the undue influence of the defendant; but that the third codicil was procured by the fraud of the defendant.

THE COURT pronounced accordingly for the will and two codicils, but against the third codicil.

Bayford, (*B. Deane*, with him), moved the Divisional Court (the President and A. L. Smith, J.) for a new trial on the ground of surprise, misdirection, that the verdict was against the weight of evidence, and also because "the judge at the trial improperly allowed the plaintiff to amend his pleadings in the course of the

trial, and after the defendant's case had been closed, by alleging in his plea and particulars that the defendant had by fraud obtained the execution by the testatrix of the said codicil of November 3, 1886." On this last point he submitted that after the defendant's case was closed it was too late to amend the pleadings by adding a charge of fraud. The other side must have known all about their case, and they must have known that the circumstances on which they relied amounted to fraud; therefore they had no right to spring this charge on the defendant at a time when he could not be prepared to meet it. They cited *Davy* v. *Garrett* (1), *Symonds* v. *City Bank* (2), and *Abdool Hoosein* v. *Agnew*. (3)

Sir E. Clarke, S.G. The authorities only go to this, that there may be cases in which it is extremely wrong to exercise this discretion, but in this case the facts from which fraud could be concluded were not disclosed until the defendant was cross-examined. No injustice was done, because the plaintiff was recalled, and another witness was examined.

THE COURT granted a new trial on the ground of surprise, but in regard to the amendment of the pleadings held that the learned judge was justified in allowing it under the circumstances. The charges made against the defendant, if established, would properly support a charge of fraud, and it was therefore the duty of the judge to allow the plaintiff to amend her pleadings, always taking care that the defendant was exposed to no hardship. This the learned judge did by offering to allow a postponement if the defendant wished it. The defendant's counsel had not availed themselves of this offer, but the Court was of opinion that they were not thereby precluded from arguing that their client was taken by surprise by the evidence given at the trial in support of the plea of fraud.

Solicitors for plaintiffs: *Munton & Morris.*
Solicitors for defendant: *Henley & Sweet.*

(1) 7 Ch. D. 473. (2) 34 W. R. 364.
(3) Not reported. Printed judgment of Privy Council accepted by the Court.

W. L.

1889
Feb. 11.

STOKER *v.* STOKER, SKIDMORE AND MURRAY.
STOKER *v.* STOKER.

Divorce—Cross-Petitions—Both Parties found Guilty—Husband's incestuous Adultery—Condonation—Discretionary Bar.

In cross-petitions by the husband and wife for dissolution of marriage the jury found that the wife had committed adultery, and that the husband had committed adultery with the wife's sister and with another woman, and that the wife had condoned his adultery.

The Court in the circumstances refused to make any decree, and dismissed both petitions.

THESE were cross-petitions in which the husband and wife respectively prayed for a dissolution of the marriage.

The husband, Frederick William Stoker, charged his wife, Isabella Stoker, with the commission of adultery with the co-respondents H. Skidmore and J. Murray.

The respondent and co-respondents pleaded denying the adultery, and the wife in her petition alleged that her husband had been guilty of incestuous adultery with her sister, and also that he had committed adultery with another woman. The husband pleaded denying the adultery and alleging condonation.

At the hearing before Butt, J., and a special jury, no evidence was offered on the husband's petition against the co-respondent Murray, but the jury found that the wife had committed adultery with the co-respondent Skidmore.

On the wife's petition the husband admitted the adultery, and the jury found that he had been guilty of incestuous adultery, but that this adultery had been condoned.

Bayford, Q.C. (*Spokes*, with him), for the husband, referred to *Rose* v. *Rose* (1), where Jessel, M.R., said: "My present impression is that adultery by a husband which has been condoned is not necessarily a bar to his petition for dissolution on the ground of adultery by the wife. The point must be considered as open."

Inderwick, Q.C. (*Middleton* with him), for the wife.

(1) 8 P. D. 98.

Searle, for the co-respondent Skidmore.
B. Deane, for the co-respondent Murray.

BUTT, J. The findings of the jury have been given, and the only matter remaining is for me to dispose of the petitions according to law. If I were to consult my own inclination, I should be disposed to pronounce a decree of dissolution, not out of any consideration for the husband in this case, but because in the interest of the wife it would be far the more merciful course, inasmuch as I should have the power of imposing terms on the husband before making the decree absolute—terms which would insure some provision being made for the future maintenance of his divorced wife. Now it is quite clear that I could not grant the relief on the petition of the wife, because her adultery would in fact be absolutely conclusive against that course, her adultery never having been condoned. The only way, therefore, in which I could effect the object I have indicated would be by making the decree in the suit of the husband, and on the prayer of his petition. On a review of the cases, I think the law is this, that I have a discretion in the matter under the statute, and if the circumstances of the case warranted the exercise of that discretion in the sense of granting the relief prayed for by the husband, I should have the power to do so. But I must not forget that the discretion given to me must be exercised judicially, not fancifully, or arbitrarily, and, when I look at the cases, I cannot find one in which, under similar circumstances, the discretion to which I have referred has been exercised in the way of making a decree. I find it stated, on the contrary, in many cases—if not in all—that such discretion is only to be exercised in that way under very exceptional circumstances. I cannot say that I think there are any special circumstances in the present case which would justify me in making a precedent by granting a decree. On the contrary, here there is adultery by the husband with his wife's sister. That is what the law calls incestuous adultery. I think that is a special circumstance which tells in the opposite sense—that is to say, against the exercise of the discretion—by pronouncing a decree. I must, therefore—though I do so with some regret—dismiss both peti-

1889

STOKER v. STOKER.

tions. The co-respondent Murray, in whose favour there has been a finding, is to have costs, and there will be the usual order for the wife's costs in both suits.

Solicitors for husband: *Radford & Frankland.*
Solicitors for wife: *Lewis & Lewis.*
Solicitors for co-respondent Skidmore: *Nisbet & Daw.*
Solicitor for co-respondent Murray: *Freke Palmer.*

W. L.

March 15, 16.

JACKMAN *v.* JACKMAN AND WILLOUGHBY.

Divorce—Husband's Petition—Counter-charge of Adultery—Rebutting Evidence —Practice—32 & 33 Vict. c. 68, *s.* 3.

At the hearing of a petition by the husband for dissolution of marriage on the ground of his wife's adultery, in which the wife made a counter-charge of adultery against him:—

Held, that the petitioner might, as part of the case opened by him, give his own evidence and call his witnesses in answer to the respondent's charge, or that he might in the alternative reserve his answer to the charge until the respondent's witnesses in support of it had been examined, but that he was not entitled to divide his case by giving his own evidence in the opening, and afterwards calling his witnesses in reply to the respondent's case.

THIS was a petition by the husband praying for the dissolution of the marriage on the ground of his wife's adultery with the co-respondent, and claiming damages. The respondent and the co-respondent denied the adultery, and the respondent in her answer charged the petitioner with adultery and cruelty, and prayed for a dissolution of the marriage.

The petition was heard before Butt, J., with a special jury.

Sir E. Clarke, S.G. (*Bayford, Q.C.*, and *Middleton*, with him), for the petitioner.

Inderwick, Q.C. (*B. Deane*, with him), for the respondent.

Finlay, Q.C. (*Searle*, with him), for the co-respondent.

The petitioner was examined as to his relations with his wife, and the circumstances under which she had written a confession of improper conduct with the co-respondent, but no question was put to him on examination in chief in reference to the charges of adultery made against him.

1889

JACKMAN v. JACKMAN.

Inderwick, Q.C., for the respondent, after a general cross-examination, observed that as the petitioner had not given evidence in disproof of his own adultery he was not liable under s. 3 of the Evidence Act of 1869 to be asked any question to shew that he had been guilty of adultery. Whereupon

Sir E. Clarke, S.G., proposed to ask the petitioner whether he had been guilty of adultery in order that he might be cross-examined, but to defer the examination of witnesses in support of his denial until the respondent's witnesses in proof of the adultery had been examined, when, if necessary, he would tender a rebutting case.

Inderwick, Q.C., for the respondent. The petitioner's counsel must take one of two courses. He may either ask the petitioner whether he has committed adultery, and then proceed to call witnesses to support his denial, or he may refrain from putting the question, and wait for the completion of the respondent's case to bring forward rebutting evidence. But he cannot split up his case into two parts as he now proposes. There is no distinct authority on the point, but the respondent's contention is in accordance with invariable practice.

Sir E. Clarke, S.G., for the petitioner, expressed his willingness to adopt whichever course the Court held to be regular.

BUTT, J. I have no hesitation in ruling in favour of Mr. Inderwick's contention, that if the petitioner is asked now as to adultery, his witnesses in support of that denial must be called as part of his original case. On the other hand, the question of his adultery may be reserved altogether for a rebutting case after the respondent's witnesses have been called.

The question was not put, but at the end of the respondent's case the petitioner and other witnesses were called to rebut the charge of adultery.

The jury found all the issues in favour of the petitioner, and assessed the damages at 3000*l.*

Solicitor for the petitioner: *T. D. Dutton.*

Solicitors for the respondent and co-respondent: *Meredith & Co.*

W. L.

1889
Feb. 23, 25.

[IN THE COURT OF APPEAL.]

THE MOORCOCK.

Ship—Damage—Jetty in Tidal River—Vessel of necessity grounding—Implied Representations by Wharfinger.

The defendants, wharfingers, in consideration of charges for landing and storing the cargo, agreed to allow the plaintiff, a shipowner, to discharge his vessel at the defendants' jetty, which extended into the River Thames, where the vessel must necessarily ground at low water. The bed of the river adjoining the jetty was vested in the Conservators. The defendants had no control over the bed of the river, and had taken no steps to ascertain whether it was or was not a safe place for the vessel to lie upon. The vessel, on grounding, sustained damage from the uneven condition of the bed of the river adjoining the jetty:—

Held, affirming the judgment of Butt, J., that the defendants were liable, for the use of their premises by the plaintiff could not under the circumstances be had without the vessel grounding, and the defendants must, therefore, be deemed to have impliedly represented that they had taken reasonable care to ascertain that the bottom of the river adjoining the jetty was in such a condition as not to cause injury to the vessel.

Appeal by the defendants from a judgment of Butt, J. (1), by which they were held liable for the damage sustained by the plaintiff's vessel whilst lying at their jetty.

The facts, which are fully set out in the report in the Court below (1), were shortly as follows:

The appellants were wharfingers possessed of a wharf abutting on, and a jetty extending into, the River Thames. The respondent was the owner of the steamship *Moorcock*.

In November, 1887, it was agreed between the appellants and the respondent that the vessel should be discharged and loaded at the wharf, and for that purpose should be moored alongside the jetty where she would take the ground at low water.

No charge was made in respect of the vessel being moored alongside, or lying at, the jetty, but the shipowner paid for the use of the cranes in discharging the cargo, and rates were payable to the appellants on all goods landed, shipped, or stored.

Whilst the *Moorcock* was lying moored at the extremity of the

(1) Reported 13 P. D. 157.

jetty discharging her cargo, the tide ebbed, and when she ceased to be waterborne, she sustained damage, owing to the centre of the vessel settling on a ridge of hard ground beneath the mud.

Butt, J., came to the conclusion that there was no warranty by the wharfinger that the place was safe for the vessel to lie in, and that the evidence negatived any express representation by him that the place was suitable for the vessel, but the learned judge held that as the use of the wharfingers' premises by the owner of the *Moorcock* required that the vessel should take the ground when moored alongside the jetty, there was an implied representation by the wharfinger that he had taken reasonable care to ascertain that the bottom of the river at the jetty was in such a condition as not to endanger the vessel.

Finlay, *Q.C.*, and *Hollams*, for the appellants. There was no implied warranty that this was a safe berth for the vessel to lie in, nor any implied representation that care had been taken to ascertain the condition of the bottom of the river at the jetty. The owners of the jetty were not bound to ascertain the state of the bed of the river, or to repair it, and no duty was cast upon them towards the shipowner except that it may be conceded that they ought not to allow a vessel to come there if they knew that there was a trap: *Reg.* v. *Williams*. (1) There was no evidence of want of reasonable care. The wharfinger had no reason to think that the place was not suitable, as another vessel of fully the same length was lying safely at the jetty, and was shewn to the owner of the *Moorcock* at the time the negotiations were going on with reference to the latter vessel coming there. The wharfinger, as owner of the jetty, was only a licensee of the Thames Conservancy, in whom the soil of the bed of the river was vested, and as the river is a public highway the case is analogous to that of a warehouse adjoining a public road. The only duty cast upon the owner of the warehouse would be not to invite a person to come to it if he knew that it was in a dangerous state. [The case of the *Mersey Docks Trustees* v. *Gibbs* (2) was referred to.]

(1) 9 App. Cas. 418. (2) Law Rep. 1 H. L. 93.

1889

THE MOORCOCK.

Feb. 25. *Barnes, Q.C.*, and *W. S. Robson*, for the respondent. The jetty could not, in the ordinary course of business, be used without the vessel lying at it grounding at low water. It must, therefore, be held to have been part of the contract that the owner of the jetty had taken care to ascertain that the bed of the river adjoining the jetty was reasonably safe for a vessel to lie on, or, at any rate, the shipowner was entitled to warning if it was not safe: *White* v. *Phillips*. (1) [The following cases were cited: *Curling* v. *Wood* (2), *Winch* v. *The Conservators of the Thames*. (3)]

Finlay, Q.C., in reply.

LORD ESHER, M.R. In this case the appellants made an agreement with the respondent for the use of their wharf and jetty in such a manner as to enable them to earn money from the respondent. The use of their wharf involved the use of the river adjacent to the front of their wharf, for the owner of a vessel such as the *Moorcock* could not use their wharf without mooring that vessel alongside the jetty. It is a necessary and an immediate step to the earning profit by the use of the wharf that the vessel should be moored to the jetty. The appellants do not charge directly for the use of their wharf, but they cannot charge anything to anybody, or, under the circumstances, earn anything until the vessel moors itself to their jetty. She is moored to the jetty in order that the wharf may be used for the loading and unloading of goods into and from the vessel, and the appellants get paid for the use of their wharf by charging in respect of the goods that lie on and cross their wharf.

Such a vessel as the *Moorcock* could not be moored to this wharf without taking the ground at low water on every tide; therefore, in order that the wharf may be used so that the appellants may earn profit, a vessel must be moored to their wharf, and at the front of it, under such circumstances that she must take the ground at every tide. Now the owners of the wharf and the jetty are there always, and if anything happens in front of their wharf they have the means of finding it out, but persons who come in their ships to this wharf have no reasonable means of

(1) 33 L. J. (C. P.) 33. (2) 16 M. & W. 628.
(3) Law Rep. 7 C. P. 458; 9 C. P. 378.

1889

THE MOORCOCK.

Lord Esher, M.R.

discovering what the state of the bed of the river is until the vessel is moored and takes the ground for the first time.

What, then, is the reasonable implication in such a contract? In my opinion honest business could not be carried on between such a person as the respondent and such people as the appellants, unless the latter had impliedly undertaken some duty towards the respondent with regard to the bottom of the river at this place. If that is so, what is the least onerous duty which can be implied? In this case we are not bound to say what is the whole of the duty. All we have got to say is whether there is not at least the duty which the learned judge in the court below has held does lie on them and to be implied as part of their contract. The appellants can find out the state of the bottom of the river close to the front of their wharf without difficulty. They can sound for the bottom with a pole, or in any way they please, for they are there at every tide, and whether they can see the actual bottom of the river at low water is not material. Supposing at low water there were two feet of water always over the mud, this would make no difference. Persons who are accustomed to the water do not see the bottom of the water with their eyes, they find out what is there by sounding, and they can feel for the bottom and find out what is there with even more accuracy than if they saw it with their eyes, and when they cannot honestly earn what they are desiring to earn without this, it is implied that they have undertaken to see that the bottom of the river is reasonably fit, or at all events that they have taken reasonable care to find out that the bottom of the river is reasonably fit for the purpose for which they agree that their jetty should be used, that is, they should take reasonable care to find out in what condition the bottom is, and then either have it made reasonably fit for the purpose, or inform the persons with whom they have contracted that it is not so. That I think is the least that can be implied as their duty, and this is what I understand the learned judge has implied, and then he finds as a matter of fact that they did not take reasonable means in this case, and in that view also I agree. I therefore think the appellants broke their contract, and that they are liable to the respondent for the injury which his vessel sustained.

1889

THE MOORCOCK.

I should add that I do not think any of the cases cited are authorities governing this case. This decision goes a step beyond any of them.

BOWEN, L.J. The question which arises here is whether when a contract is made to let the use of this jetty to a ship which can only use it, as is known by both parties, by taking the ground, there is any implied warranty on the part of the owners of the jetty, and if so, what is the extent of the warranty. Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.

Now what did each party in a case like this know? For if we are examining into their presumed intention we must examine into their minds as to what the transaction was. Both parties knew that this jetty was let out for hire, and knew that it could only be used under the contract by the ship taking the ground. They must have known that it was by grounding that she used the jetty; in fact, except so far as the transport to the jetty of

the cargo in the ship was concerned, they must have known, both of them, that unless the ground was safe the ship would be simply buying an opportunity of danger, and that all consideration would fail unless some care had been taken to see that the ground was safe. In fact the business of the jetty could not be carried on except upon such a basis. The parties also knew that with regard to the safety of the ground outside the jetty the shipowner could know nothing at all, and the jetty owner might with reasonable care know everything. The owners of the jetty, or their servants, were there at high and low tide, and with little trouble they could satisfy themselves, in case of doubt, as to whether the berth was reasonably safe. The ship's owner, on the other hand, had not the means of verifying the state of the jetty, because the berth itself opposite the jetty might be occupied by another ship at any moment.

Now the question is how much of the peril of the safety of this berth is it necessary to assume that the shipowner and the jetty owner intended respectively to bear—in order that such a minimum of efficacy should be secured for the transaction, as both parties must have intended it to bear? Assume that the berth outside had been absolutely under the control of the owners of the jetty, that they could have repaired it and made it fit for the purpose of the unloading and the loading. If this had been the case, then the case of *The Mersey Docks Trustees* v. *Gibbs* (1) shews that those who owned the jetty, who took money for the use of the jetty, and who had under their control the locus in quo, would have been bound to take all reasonable care to prevent danger to those who were using the jetty—either to make the berth outside good, or else not to invite ships to go there—either to make the berth safe, or to advise persons not to go there. But there is a distinction in the present instance. The berth outside the jetty was not under the actual control of the jetty owners. It is in the bed of the river, and it may be said that those who owned the jetty had no duty cast upon them by statute or common law to repair the bed of the river, and that they had no power to interfere with the bed of the river unless under the licence of the Conservators. Now it does make a difference, it

(1) Law Rep. 1 H. L. 93.

1889

THE MOORCOCK.

Bowen, L.J.

seems to me, where the entire control of the locus in quo—be it canal, or be it dock, or be it river berth—is *not* under the control of the persons who are taking toll for accommodation which involves its user, and, to a certain extent, the view must be modified of the necessary implication which the law would make about the duties of the parties receiving the remuneration. This must be done exactly for the reason laid down by Lord Holt in his judgment in *Coggs* v. *Bernard* (1), where he says "it would be unreasonable to charge persons with a trust further than the nature of the thing puts it in their power to perform." Applying that modification, which is one of reason, to this case, it may well be said that the law will not imply that the persons who have not the control of the place have taken reasonable care to make it good, but it does not follow that they are relieved from all responsibility. They are on the spot. They must know that the jetty cannot be used unless reasonable care is taken, if not to make it safe, at all events to see whether it is safe. No one can tell whether reasonable safety has been secured except themselves, and I think if they let out their jetty for use they at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so. This is a business transaction as to which at any moment the parties may make any bargain they please, and either side may by the contract throw upon the other the burden of the unseen and existing danger. The question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they say nothing about the burden of this kind of unseen peril, leaving the law to raise such inferences as are reasonable from the very nature of the transaction. So far as I am concerned I do not wish it to be understood that I at all consider this is a case of any duty on the part of the owners of the jetty to see to the access to the jetty being kept clear. The difference between access to the jetty and the actual use of the jetty seems to me, as Mr. Finlay

(1) Ld. Raym. 909 (918); 1 Sm. L. C. 9th ed. 201 (216).

says it is, only a question of degree, but when you are dealing with implications which the law directs, you cannot afford to neglect questions of degree, and it is just that difference of degree which brings one case on the line and prevents the other from approaching it. I confess that on the broad view of the case I think that business could not be carried on unless there was an implication to the extent I have laid down, at all events in the case where a jetty like the present is so to be used, and, although the case is a novel one, and the cases which have been cited do not assist us, I feel no difficulty in drawing the inference that this case comes within the line.

FRY, L.J. I agree. I will only add that the considerations which weigh much with me in coming to the conclusion that there was the implication which the learned judge had relied on, are that the Conservators were under no obligation to remove the saddle-back, or shingle, or stone, which did the injury, and that the defendants had the means of examining the bottom of the river and neglected to do so.

Appeal dismissed.

Solicitors for appellants: *Hollams, Son, & Coward.*
Solicitors for respondent: *T. Cooper & Co.*

E. S. R.

THE ECLIPSE.

May 7.

Admiralty—Practice—Appeal from inferior Court—Application to adduce fresh Evidence—Judicature Act, 1873, *s.* 52—*Order* LIX., *r.* 17.

An application to allow fresh evidence to be adduced at the hearing of an Admiralty appeal from an inferior Court may be made to a single judge of the Admiralty Division.

MOTION before Butt, J., on an appeal from the City of London Court, for leave to adduce fresh evidence at the hearing before the Divisional Court.

Watson, for the respondents. There is a preliminary objection. The learned judge sitting alone cannot hear this application. The application should be made to the Divisional Court, which

1889

THE ECLIPSE.

is the only Court which has jurisdiction to hear Admiralty appeals from inferior Courts: Order LIX., rule 4 (1).

Cohen, Q.C., and *Butler Aspinall*, for the appellants. The application is properly made to a single judge. By the Judicature Act, 1873, s. 52 (2), a single judge of the Court of Appeal may give any direction incidental to the appeal, and by Order LIX., rule 17 (3), the practice of the Court of Appeal is to govern appeals from inferior Courts, so that s. 52 is applicable to this appeal.

BUTT, J. I overrule the objection.

The application was then heard on its merits.

Solicitor for appellants: *O. H. Clarkson.*

Solicitors for respondents: *Tatham, Oblein, & Nash.*

(1) Rule 4: "Every judge of the High Court of Justice for the time being shall be a judge to hear and determine appeals from inferior Courts, under s. 45 of the principal Act. All such appeals (except Probate and Admiralty appeals from inferior Courts, and from justices, which shall be to a Divisional Court of the Probate, Divorce, and Admiralty Division) shall be entered in one list by the officers of the Crown Office Department of the Central Office, and shall be heard by such Divisional Court of the Queen's Bench Division as the Lord Chief Justice of England shall from time to time direct."

(2) Sect. 52: "In any cause or matter pending before the Court of Appeal, any direction incidental thereto not involving the decision of the appeal, may be given by a single judge of the Court of Appeal; and a single judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit; but every such order made by a single judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof."

(3) Rule 17: "Subject to these rules, the rules for the time being in force with respect to appeals from the High Court to the Court of Appeal shall, so far as practicable, apply to and govern appeals from county courts and other inferior courts of record of civil jurisdiction to the High Court."

E. S. R.

THE IMBRO.

1889

April 6, 10; *May* 7.

Collision—Stern Light—Overtaking Ship—Regulations for Preventing Collisions at Sea, arts. 2, 11.

By "the Regulations for Preventing Collisions at Sea," art. 2: "The lights mentioned in the following articles [which include art. 11] shall be carried in all weathers, from sunset to sunrise." By art. 11 "a ship which is being overtaken by another shall shew from her stern to such last-mentioned ship a white light or a flare-up light:"—

Held, that it is a breach of the above Regulations for a vessel when no other vessel overtaking it is in sight to carry a white light permanently fixed upon its stern.

Semble, that art. 11 only contemplates the holding up or flashing of a light to an overtaking ship.

An overtaking vessel within the meaning of art. 11 is one which is approaching another from aft, and is more than two points abaft the beam of the foremost ship.

ACTION for damage by collision. The plaintiffs were the owners of the ship *Poseidon*, which, about 7 P.M. on February 25, 1889, came into collision with the steamship *Imbro*. At the time in question the *Poseidon* was lying becalmed in the Straits of Dover heading about N.N.W., but without steerage way: the weather was fine and clear: a white globular light had been hung from and over the taffrail, and there was a canvas screen round the poop so that the light should not shew ahead. The stern of the *Poseidon* was eliptical in shape. Those on board the *Imbro* perceived this white light at a distance of from three and a half to four miles, about half a point on the starboard bow. A red light was shortly after seen, and the officer on the watch supposed that the two lights belonged to two different vessels. In the result the *Imbro* struck the *Poseidon* on her port quarter.

In addition to the question whether the *Imbro* was to blame, it was contended by the owners of that vessel that the *Poseidon* was also to blame for carrying a fixed stern light.

Myburgh, Q.C., and *Bucknill, Q.C.*, for the plaintiffs. The *Poseidon* is not to blame for the collision. The *Imbro* was an overtaking ship and should have kept out of the way of the *Poseidon*. The *Poseidon* duly complied with art. 11 of the Regu-

1889

THE IMBRO.

lations for Preventing Collisions at Sea by shewing a light over her stern. The fact that it was fixed was not a breach of art. 11. (1) To carry a light continuously and to "shew" it are synonymous terms: see art. 10 (*b*). Art. 2 (2) directs that the light mentioned in this and other articles "shall be carried," and in the other articles therein referred to there must be a continuous carrying, so that it is contemplated that the stern light may be fixed.

Sir W. Phillimore, and *Aspinall*, for the defendants. The plaintiffs' light was not exhibited according to the Regulations, it ought not to have been fixed: *The Palinurus*. (3) The stern light ought only to be shewn to a vessel which is actually seen by those on board the overtaken vessel to be an overtaking vessel, that is, within the dark area of space from two points abaft either beam: *The Main* (4); *The Franconia* (5); *The Pacific*. (6) This white light was visible forward of the stern, and was such as to mislead the *Imbro*, those on board the *Imbro* being able to see the red light of the *Poseidon*. The former was not an overtaking ship: *The Main* (4). The breach of the Regulations clearly contributed to the collision: *The Dunelm*. (7)

Myburgh, Q.C., in reply. The dictum in *The Palinurus* (3) was not necessary for the decision of that case.

Cur. adv. vult.

1889. May 7. BUTT, J. At seven o'clock in the evening of February 25 last, a collision occurred between the ship *Poseidon* and the steamer *Imbro*. The *Poseidon* was bound on a voyage from Chittagong to Dundee, laden with a carge of jute, and was lying becalmed off Dungeness. She was heading to the northward and westward, without steerage way. The *Imbro* was on a voyage from Bilbao to Newcastle laden with iron ore. She was steering E. by N. $\frac{3}{4}$ N., and was making eight knots an hour.

(1) Art. 11: A ship which is being overtaken by another shall shew from her stern to such last-mentioned ship a white light or a flare-up light.

(2) Art. 2: The lights mentioned in the following articles numbered 3, 4, 5, 6, 7, 8, 9, 10, 11, and no others, shall be carried in all weathers from sunset to sunrise.

(3) 13 P. D. 14.

(4) 11 P. D. 132.

(5) 2 P. D. 8.

(6) 9 P. D. 124.

(7) 9 P. D. 164.

1889

THE IMBRO.

Butt, J.

Under the Regulations for Preventing Collisions at Sea it was the duty of the officer in charge of the steamer to keep out of the way of the *Poseidon*. In fact she ran into the *Poseidon* at considerable speed, the stem and port bow of the steamer striking the port quarter of the sailing vessel. The officer in charge of the *Imbro* endeavoured to excuse himself by saying that he was misled by the *Poseidon* exhibiting an improper light, and that this was the real cause of the collision. After stating the course and speed of the steamer, and that her regulation lights were duly exhibited, the statement of defence alleges as follows: "(3) In these circumstances those on board the *Imbro* observed a white light, which afterwards proved to be on the *Poseidon*, distant 3½ to 4 miles, and bearing about half a point on the starboard bow. This light was taken to be the masthead light of a steamship, and was watched in the expectation that she would shew one or both of her side lights, and the *Imbro* was kept on her course. Some time afterwards a red side light was seen nearly right ahead, but a little on the port bow withal, and was taken to be the light of a sailing vessel, the white light being still about the same bearing on the starboard bow. Both lights were carefully watched, and the *Imbro* was kept on her course, as it was believed that the red light could be easily cleared when the supposed steamship, shewing the white, had been made out and acted for, but suddenly the white and red lights before mentioned were (by the cabin lights of the *Poseidon*) made out to be on the same ship, and, although the helm of the *Imbro* was at once put hard a-port, and her engines reversed full speed, the *Imbro*, with her stem and port bow, struck the port quarter of the *Poseidon*, thereby sustaining damage . . . . . (5.) Those on board the *Poseidon* improperly carried a stern light so as to be visible continuously, and within area of her red light, and so as to mislead those on board the *Imbro*." It is impossible to accept the evidence adduced in support of the allegations as entirely accurate and trustworthy. It is not, however, necessary to deal with it now in detail, because I am of opinion that on his own shewing the officer in charge of the *Imbro* was to blame. He was approaching two lights, a white one and a red one, both nearly ahead of him, which he says he mistook for the lights of two

1889

THE IMBRO.

Butt, J.

different vessels, the one a sailing ship, the other a steamer. Contrary to his expectation the vessel which he says he mistook for a steamer failed to open either one or the other of her coloured lights—a circumstance in itself embarrassing, and suggestive of difficulty and danger, inasmuch as it prevented his judging of the direction she was steering. Yet he kept on at full speed until he got so close to the *Poseidon* that it was impossible to avoid a collision with that vessel lying practically helpless and motionless on the water. The Elder Brethren agree with me in regarding this as reckless and negligent navigation, and a breach of art. 18 of the Regulations. The *Imbro* must therefore be held to blame.

Then comes the question, was the *Poseidon* also to blame? Besides the regulation side lights she was carrying over her stern a white light in a globe lantern lashed to the rail. We were asked to believe that this light was so fixed that it could not be seen forward of a line drawn at the stern of the ship at right angles to her keel. The ship has an elliptical stern, and we have no doubt that the light in question would, and did in fact, shew considerably forward of such line; that its rays intersected the rays of the coloured lights at no great distance from the ship, and that both the red light and the stern light of the *Poseidon* were at one and the same time open, and were actually seen by those on board the *Imbro*. Is it a breach of the Regulations to carry a light so fixed? The following articles of the Regulations for Preventing Collisions at Sea are material: Art. 2: "The lights mentioned in the following articles numbered 3, 4, 5, 6, 7, 8, 9, 10, 11, and no others, shall be carried in all weathers from sunset to sunrise." Art. 11: "A ship which is being overtaken by another shall shew from her stern to such last mentioned ship a white light or a flare-up light." It is an infringement of art. 2 to carry a stern light fixed as a permanent light, because when there is no vessel overtaking, it would be a light "other" than those prescribed. I am disposed to think that art. 11 contemplates only the holding up, or flashing of a light, to an overtaking ship. The words certainly do not authorize the carrying of such light on board a ship when there is no vessel overtaking her in sight. I hold it to be contrary to

the spirit as well as to the words of the articles for a vessel to exhibit such a fixed light to a vessel which is not overtaking her within the meaning of the rule; though it may be inevitable that a light, *e.g.*, a flare shewn to an overtaking vessel, shall be seen by another not overtaking her.

It becomes, then, material to determine, what is an overtaking vessel within the meaning of art. 11. In my opinion a vessel approaching another from aft, and being more than two points abaft the beam of the foremost ship—a position from which the coloured side lights of the foremost vessel would not be visible—is an overtaking vessel within the meaning of art. 11, and a vessel is not an overtaking vessel within the meaning of this article, unless she is more than two points abaft the beam of the other vessel. In one sense, no doubt, a vessel may be overtaking another when she is less than two points abaft the beam of that other. I hold, nevertheless, that she is not an overtaking vessel within the meaning of the word as used in art. 11; the whole object of the article being, in my judgment, to provide for a warning light being shewn to a vessel approaching another from aft, and in a position from which the coloured lights of the foremost vessel would not be visible. This appears to me an interpretation which makes the several articles of the Regulations work in harmony, and which obviates the difficulty to which I referred in the case of *The Seaton*. (1) I mention that case for the purpose of saying here, that I consider any expression which I may have used during the arguments of counsel in it, and which may conflict with my present decision, erroneous. Applying arts. 2 and 11, as I have interpreted them, to the facts of this case, it is clear that those in charge of the *Poseidon* were guilty of a breach of the Regulations in carrying the stern light as they did. Whether that breach of the Regulations was one which would have misled the second officer of the *Imbro*, I am not concerned to inquire. The 17th section of 36 & 37 Vict. c. 85, provides as follows: "If in any case of collision it is proved to the Court before which the case is tried that any of the regulations for preventing collision, contained in, or made under, the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulation has

(1) 9 P. D. 2.

1889

THE IMBRO.

Butt, J.

been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary." It has been proved that one of the regulations referred to in that section has been infringed; it is not shewn that the circumstances of the case made a departure from the regulation necessary; and it is in my judgment, impossible to say that the infringement of the regulation in question may not have caused, or contributed to, the collision. I think that the interpretation of the Regulations which I have expressed above is covered by the decisions of the Court of Appeal in the cases of *The Franconia* (1), and of *The Main* (2), and of the President of this Division in the case of *The Palinurus* (3). If this decision goes to any extent beyond the authority of those cases, the responsibility is mine. I pronounce both vessels to blame.

Solicitors for the plaintiff: *Hollams, Son & Coward.*
Solicitors for the defendants: *Downing & Holman.*

E. S. R.

May 21.

THE NEREID.

Collision—Limitation of Liability—Stay of Proceedings—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 514.

In an action of limitation of liability the plaintiffs claimed a stay of proceedings in respect of claims for damage to ship and goods, and in respect of claims for personal injuries and loss of life, on paying into Court a sum representing 8*l.* per ton in respect of damage to ship and goods, and on giving security for the difference between 8*l.* and 15*l.* in respect of claims for personal injuries and loss of life:—

Held, that the stay of proceedings might be ordered in respect of the claims for damages to ship and goods, but not in respect of the claims for personal injuries and loss of life.

MOTION for judgment in an action of limitation of liability. The plaintiffs were the owners of the *Nereid*. The defendants were respectively the owners of the ship *Killochan*; the owners of cargo lately laden on board her, part of the officers and crew of

(1) 2 P. D. 8. (2) 11 P. D. 132.
(3) 13 P. D. 14.

the same ship, and the personal representatives of the master and of such of the crew of the *Killochan* as lost their lives in a collision between that vessel and the *Nereid*. The owners of the *Nereid* admitted their liability for the collision in consequence of the negligent navigation of their vessel.

The plaintiffs' statement of claim and the affidavit in support of it were in the ordinary form. The plaintiffs prayed for a decree limiting their liability to 8*l*. per ton in respect of damage to ship and goods upon payment into court of the sum of 7330*l*., being the amount of their statutory liability at the above rate and limiting their liability to 15*l*. per ton in respect of loss of life and personal injuries, on giving security for the balance representing the difference between 8*l*. and 15*l*. per ton.

Aspinall, for the plaintiffs. The usual decree is asked for and an order staying all actions in respect of the collision, according to the provisions of the Merchant Shipping Act, 1854, s. 514. (1)

Stokes, for the claimants in respect of loss of life. There should be no stay of proceedings in respect of the claims for loss of life; the writs have been issued and the claimants desire to go before a jury.

Batten, for the owners of the *Killochan* and the owners of cargo, consented to the decree asked for.

(1) Sect. 514: "In cases where any liability has been or is alleged to have been incurred by any owner in respect of loss of life, personal injury, or loss of or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability, then, subject to the right hereinbefore given to the Board of Trade of recovering damages in the United Kingdom in respect of loss of life or personal injury, it shall be lawful in England or Ireland for the High Court of Chancery, and in Scotland for the Court of Session, and in any British possession for any competent Court to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability subject as aforesaid, and for the distribution of such amount rateably amongst the several claimants, with power for any such Court to stop all actions and suits pending in any other Court in relation to the same subject matter; and any proceedings entertained by such Court of Chancery or Court of Session, or other competent Court, may be conducted in such manner and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to the requiring security from the owner, and as to payment of costs, as the Court thinks just."

1889

THE NEREID.

BUTT, J. I make the usual decree for the limitation of the plaintiffs' liability in respect of the claims for loss of property and injury to the other vessel. I will not make an order to stay the actions in respect of loss of life, but the plaintiffs must nevertheless give security for the difference between 8*l.* and 15*l.* in respect of the life claims.

Solicitors for plaintiffs: *T. Cooper & Co.*
Solicitors for defendants: *Pritchard & Sons.*

E. S. R.

April 16.

LANCASTER AND OTHERS *v.* BROOK AND ANOTHER.

Probate—Suit for Revocation—Jurisdiction of Registrar—Order for Trial at Assizes.

The registrar, in a suit for revocation of probate, has no power to order the venue to be changed, and to direct that the suit be removed from this Court to be tried at the assizes.

APPLICATION to reverse an order made in the registry directing a suit for revocation of probate to be tried at the Leeds Assizes.

William Lancaster, late of Halifax, in the county of York, deceased, died July 3, 1883, leaving a will duly executed, by which he appointed Elizabeth Sterling his sole executrix. Probate was granted to the executrix in the district registry, and she died shortly afterwards.

The plaintiffs, as next of kin and heir-at-law of the testator, instituted this suit for revocation of the probate on the ground that the will was not duly executed, that the testator was not of sound mind, memory, and understanding at the time of the execution, and that he did not know and approve of the contents. The defendants, who were the executors of Elizabeth Sterling, opposed.

An order was made in the registry directing the case to be set down for trial at the next Leeds Assizes.

Middleton, for the defendants, now moved (in chambers) that the order be rescinded, and that the suit should be set down for trial in this Division of the High Court of Justice.

Searle, for the defendants, supported the order.

BUTT, J., held that the registrar had no power to order a change of venue, and reversed the order, directing that the suit should be tried in this Division. 1889 LANCASTER v. BROOK.

Solicitors for plaintiffs: *Godfrey, Rhodes, & Co.*
Solicitors for defendants: *Robbins, Billing, & Co.*

W. L.

IN THE GOODS OF G. HARVER. HARVER *v.* HARVER (CROOK INTERVENING). *May* 21.

Probate—Administration Bond—Administrator pendente Lite—Payment of Premium to Guarantee Society out of the Estate.

In a Probate action where an administrator pendente lite had been appointed and had been ordered to give security in a penal sum of 10,488*l.* for due administration of the estate, the Court, on the application of an intervener, allowed him to pay 50*l.* out of the estate to a guarantee society which was willing to enter into a bond on his behalf, on condition that the intervener should undertake to recoup the estate in the event of his failing in the suit and being condemned in costs.

THE plaintiff in this case, who claimed to be the widow of George Harver, deceased, propounded a will by which she was appointed sole executrix, and the defendant, who also claimed to be the widow of the deceased, opposed probate on the ground of undue execution, testamentary incapacity, and that the deceased did not know and approve of the contents of the will, and she prayed for a declaration of intestacy. The intervener propounded a later will, in which he was named executor. An administrator pendente lite had been appointed, and had been ordered to give security for the due administration of the estate in the penal sum of 10,488*l.* 7*s.* 2*d.* The Law Guarantee and Trust Society, Limited, had undertaken to enter into a bond for this amount on behalf of the administrator, on the payment of a premium of 50*l.*

B. Deane, for the intervener, applied that the administrator be allowed to pay the sum of 50*l.* out of the estate, or, in the alternative, that the amount of security be reduced to double the amount of the actual cash passing through the hands of the administrator, in which case the bond would be for the sum of 2500*l.*

1889

IN THE GOODS OF G. HARVER.

C. A. Middleton, for the plaintiff, opposed.

BUTT, J. I certainly see no reason for reducing the amount of the security, but I think that the administrator may be allowed to pay the premium of 50*l.* out of the estate on condition that the intervener give security to recoup the same amount to the estate in the event of his failing to establish this will and being condemned in the costs.

Solicitor for the intervener: *A. B. Trevenen.*
Solicitors for the plaintiff: *Torr & Co.*

W. L.

June 4.

IN THE GOODS OF THORNTON.

Probate—Codicil torn up under Misapprehension—Revocation.

A testatrix, being under an erroneous impression that a codicil had not been duly executed, directed it to be torn up and sent to her solicitor to be recopied, but died before she could re-execute it:—

Held, that, in the circumstances, probate of the codicil might be allowed.

THE testatrix, Mrs. Jane Thornton, of No. 28, Royal Crescent, Bath, duly executed her last will and testament on July 7, 1885, and subsequently she executed four codicils, bearing date respectively April, 1887; March, 1888; July, 1888; and August, 1888. On March 21, 1889, she made a fifth codicil, which was duly executed and attested. This had been prepared for her by her solicitor, and sent down to her for execution, with blanks left for the date, and in filling up these blanks she inadvertently reversed the day and the month, so that the codicil concluded thus: "In witness whereof I have hereto set my hand this March day of 21st, 1889." Being under the impression that the codicil was thus rendered invalid, she directed her two grand-nieces who were present at the execution to tear the codicil into four pieces, to inclose them in an envelope, and send them to her solicitor, in order that he might prepare another copy for her to execute. Mr. Turner, on receiving the letter, pasted the four pieces of the codicil together, and prepared another draft, but the testatrix died before executing it.

1889

IN THE GOODS OF THORNTON.

Inderwick, Q.C., moved that probate be granted of the original codicil. There was clearly no animus revocandi, but simply an erroneous impression that the codicil was not duly executed.

BUTT, J., admitted the codicil to probate.

Solicitor: *Sharon G. Turner.*

W. L.

BRINKLEY *v.* ATTORNEY-GENERAL.
JULIA SCARAMANGA *v.* ATTORNEY-GENERAL.

May 28; *June* 4.

Marriage—Validity—Practice as to citing Parties other than the Attorney-General—Legitimacy Declaration Act (21 & 22 *Vict. c.* 93)—*Greek Marriages Act*, 1884 (47 & 48 *Vict. c.* 20).

The practice in future in petitions under the Legitimacy Declaration Act and the Greek Marriages Act will be that, after citing the Attorney-General, the parties on applying to have the case set down for trial must lay the state of the case, by affidavit or otherwise, before the registrar, who will direct whether any, and if so which, other parties shall be cited to see proceedings. The registrar's direction to be subject to appeal to the judge in the same manner as all other orders of the registrar.

THESE were two petitions, one under the Legitimacy Declaration Act, and the other under the Greek Marriages Act, in each of which the same point of practice arose, viz. whether, after citing the Attorney-General, the parties might proceed to set the case down for trial on their own responsibility without citing any other person, or whether they should take the directions of the Court. An order had been made recently in the registry, by direction of the President, that in no case should the papers be brought into Court until an application had been made as to the citation of other parties under s. 7 of the Legitimacy Declaration Act, which is incorporated in the Greek Marriages Act.

In the first case the petitioner, Mr. Brinkley, a natural-born subject of Her Majesty, was married on March 25, 1886, to Yosu Tanaka, a Japanese lady, in accordance with the law in force in that country, and had cohabited with her in Japan, there being one child issue of the marriage. He prayed for a decree that there was a valid marriage according to the law of this country.

In the second case Julia Ralli, a member of the Greek church,

1889

BRINKLEY v. ATTORNEY GENERAL.

JULIA SCARAMANGA v. ATTORNEY GENERAL.

was married at No. 17, Hyde Park Square, London, on May 14, 1840, to Demetrius Scaramanga, according to the rites and ceremonies of the Greek church, and she prayed for a declaration of the validity of the marriage.

Melsheimer, on behalf of Mr. Brinkley, moved for leave to dispense with the necessity for citing any person other than the Attorney-General to appear and see proceedings, and for leave to set the case down for trial.

B. Deane, on behalf of Mrs. Scaramanga, in the second case applied for directions whether any other persons should be cited.

A. Gwynne James, for the Attorney-General. These applications are unnecessary and unusual. Under the 7th section of the Act the petitioner may come into Court and ask for leave, if he thinks fit, to cite any parties having an opposite interest; but if he does not think fit, he is not bound to do so. He must take upon himself, and not throw on the Court, the responsibility of deciding; and by s. 8, no party who is not cited is bound by the proceedings. In *Upton* v. *Attorney-General* (1) the Court refused to take upon itself the responsibility of deciding what persons should be cited.

Cur. adv. vult.

BUTT, J. These are two cases, one under the Legitimacy Declaration Act, and the other under the Greek Marriages Act, and the point which arises is the same in each case. It is simply this, whether a party proceeding under either of these Acts is entitled to set down his case for trial, having made the Attorney-General respondent, and there being no other party cited. It has been under the consideration of the registrars and of the President before this. I have consulted with them, and the conclusion to which we have all come is that the right course would be for the petitioner to represent to the registrar, either by affidavit or otherwise, the exact state of the case, and then, if the registrar thinks that some person other than the Attorney-General should be joined or cited to see proceedings, he will so direct. In cases of difficulty the registrar will probably refer the matter to the

(1) 32 L. J. (P. & M.) 177.

Court, and if any question arises there will, of course, be an appeal to the Court, as in the case of all other orders made in the registry. All I decide now is that the party proceeding in each of these cases must go before the registrar, for his directions. It is a matter of practice, and this is the course which we think it desirable to follow. It is clear that the Act contemplates the exercise of some discretion as to the parties cited, and I think, with a view to preventing delay and expense, that such discretion should be exercised before the case is set down for trial.

Solicitors for Mr. Brinkley: *Bowman & Co.*
Solicitors for Mrs. Scaramanga: *Freshfields & Williams.*
Solicitors for the Attorney-General: *Solicitors to the Treasury.*

W. L.

THE DURHAM CITY.

May 27, 28.

Ship—Charterparty—Coals—Liability of Charterer.

By a charterparty between the defendants, the owners of a steamer, and the charterers, it was agreed that the owners should maintain her in a thoroughly efficient state during the term of the charterparty, and that the charterers should provide and pay for coals and fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever not appertaining to the working or efficiency of the steamer. It was also agreed that if in consequence of a breakdown of machinery the vessel put into a port other than that to which she was bound, "port charges, pilotages and other expenses" should be borne by the owners. The steamer put into Vigo, a port to which she was not bound; in consequence, as was alleged by the master, of the breakdown of the condenser. The master sued the defendants in an action for disbursements for the price of coals supplied to him at Vigo:—

Held, that, even assuming that the putting into Vigo was a necessary consequence of the breakdown of the machinery of the steamer, the price of the coals supplied there was not part of the "port charges, pilotages, and other expenses at the port" within the meaning of the charterparty, and the defendants were not liable.

ACTION for disbursements. The plaintiff was the late master of the steamship *Durham City*, and he sued the owners of that vessel in personam for certain disbursements made by him whilst master of their vessel, namely 24*l.* 13*s.* 10*d.*, for port charges and provisions at Vigo, 10*l.* 6*s.* 8*d.* for entering and clearing the vessel there, and 182*l.* cost of coals at Vigo. From December 3,

1889

THE DURHAM CITY.

1888, to April 16, 1889, the *Durham City* was on a voyage to the River Plate and back, and these disbursements were made on her homeward voyage. It was alleged by the plaintiff that when the *Durham City* was on her homeward voyage he was obliged, when 220 miles from Vigo, to deviate from his course and proceed to that port, because the condenser was leaking and it was necessary to go into some port to repair it. The disbursements were made at Vigo, and were, the plaintiff alleged, the necessary consequence of the breakdown of the machinery. The plaintiff drew on the charterers of the *Durham City* for the amount of his disbursements, but the bill was refused acceptance, and the plaintiff was sued on it, and judgment was obtained against him, and he then brought this action against the owners of the *Durham City*. The defendants denied that the deviation became necessary in consequence of the state of the condenser, and they alleged that the *Durham City* went to Vigo because she was short of coals through heavy weather. They denied their liability, and alleged that the disbursements should be paid for by the charterers, but they paid 23*l.* 1*s.* 2*d.* into Court in case anything was due from them.

By the terms of the charterparty it was, among other things, agreed that "the owners should provide and pay for all oils, paints, and stores for the vessel, and for all the provisions and wages of the captain, officers, engineers, firemen and crew; should pay for the insurance of the vessel, also for all engine-room stores, and maintain her in a thoroughly efficient state in hull and machinery for the service. The charterers should provide and pay for all the coals and fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever not appertaining to the working or efficiency of the steamer." "In the event of loss of time from the deficiency of men or stores, collision, want of repairs, breakdown of machinery or other causes appertaining to the duties of the owners, preventing the working of the vessel for more than twenty-four working hours, the payment of hire should cease until she should be again in an efficient state to resume her service; and if in consequence of such deficiency, collision, want of repairs, breakdown, or other causes the vessel should put into any port or ports other than those to which she

was bound, port charges, pilotages, and other expenses at those ports should be borne by the owners."

Sir W. Phillimore, and *Carver*, for the plaintiff. The break-down of the machinery was the cause of the deviation. The steamer was therefore not maintained in an efficient state, and having to put into port in consequence of her non-efficiency the owners are liable under the charterparty for the disbursements.

Barnes, Q.C., for the defendants. The defendants are not liable; the cause of the *Durham City* putting into Vigo was want of coal occasioned by her slow rate of progress in consequence of stormy weather. But even if she did put into Vigo in order that the condenser might be repaired, the owners are not liable for the price of the coals.

[He referred to *The Beeswing*. (1)]

Sir W. Phillimore, in reply.

BUTT, J. The struggle in this case is in fact between the owners and charterers of the ship, it being contended by the former that they are not bound to pay for the coals purchased by the master at Vigo. The main question is as to this item, the others being comparatively trifling. A question of law has therefore to be considered independently of the facts, namely, what construction is to be placed on this charterparty. I am of opinion, even assuming that the *Durham City* put into Vigo in consequence of the state of the condenser, the charterers and not the shipowners are liable to pay for the coals purchased by the master. In other words the plaintiff had not authority to order the coals for and to pledge the credit of the owners in respect of them.

The terms of the charterparty have been relied on by counsel on both sides, but I am of opinion that the words, "port charges, pilotages, and other expenses at those ports," which are to be found in the latter of the two parts of the charterparty which have been adverted to, mean that the owners have only to bear port charges, pilotages, and other expenses ejusdem generis, and have not to pay for coals, which the charterers by a previous

(1) 5 Asp. M. C. (N.S.) 484.

1889

THE DURHAM CITY.

clause have undertaken to provide and pay for. The plaintiff is therefore not entitled to recover the sum of 182*l.* If it were not for the other items it would be unnecessary to go into the facts, but as it is I must decide the question of fact in order to see whether the charterers or the shipowners are liable for the port charges and similar expenses at Vigo.

[The learned judge then held on the facts that the *Durham City* put into Vigo because she was short of coals, and not because it was necessary to go into a port to repair the condenser, which could have been done at sea. It was admitted that 10*l.* 4*s.* 2*d.* was due from the owners in respect of provisions, and the learned judge, therefore, gave judgment for the plaintiff for that sum, ordered that the balance of the sum paid into Court should be paid out to the defendants, and condemned the plaintiff in the costs of the action.]

Solicitors for plaintiff: *Pritchard, Englefield & Co., for Simpson & North, Liverpool.*

Solicitors for defendants: *Downing, Holman & Co.*

E. S. R.

March 12, 13, 14, 20, 21, 26, 27; *May* 11.

[IN THE COURT OF THE ARCHBISHOP OF CANTERBURY. (1)]

READ *v.* BISHOP OF LINCOLN.

Ecclesiastical Law—Bishop—Illegal Practices in Conduct of Divine Service—Jurisdiction of Archbishop of Canterbury.

The Bishop of Lincoln was cited to appear before the Archbishop of Canterbury to answer the charge of having been guilty of illegal practices in the conduct of divine service. The bishop appeared under protest denying that the archbishop had jurisdiction to try a bishop of the Province of Canterbury, and affirming that the proper tribunal was the archbishop and other bishops of the province assembled in Convocation or otherwise:—

Held, that the archbishop sitting alone or with assessors had jurisdiction to entertain the charge.

OBJECTION to the jurisdiction. The promoters in the suit were E. Read, W. Brown, T. F. Wilson, and J. Marshall. The respondent was the Lord Bishop of Lincoln.

(1) The Vicar-General of the Province of Canterbury (Sir J. P. Deane) sat with the archbishop and also the Bishops of London, Winchester, Oxford, and Salisbury, as assessors.

1889

READ v. BISHOP OF LINCOLN.

By a citation dated January 4, 1889, the Bishop of Lincoln was summoned to appear before the Archbishop of Canterbury at Lambeth Palace for having committed several ecclesiastical offences, viz. (1) having used lighted candles on the communion table, or on a ledge over it, for ceremonial purposes; (2) for having used water and wine for the purpose of the Holy Sacrament and consecrated the same; (3) for having stood with his back to the people while reading the Prayer of Consecration; (4) for having permitted the hymn Agnus Dei to be sung; (5) for having made the sign of the cross; (6) for having taken part in the ceremony of ablution, *i.e.*, pouring wine and water into the paten and chalice. These offences were alleged to have been committed on December 4, 1887, in the church of St.-Peter-at-Gowts; (7), (8), (9), and (10) were offences of the same kind, alleged to have been committed on a different day in Lincoln Cathedral. This citation the Archbishop of Canterbury had previously refused to issue, not being satisfied that he had jurisdiction in the matter. On appeal to the Privy Council from the refusal, it was held that the archbishop had jurisdiction. (1)

On February 12, 1889, the Bishop of Lincoln appeared under protest at Lambeth Palace before the Archbishop of Canterbury, and his assessors, and prayed that he might be heard by counsel in support of his protest.

On February 19, the extension of the protest of the Bishop of Lincoln was brought in. The grounds of the protest were that there was no jurisdiction to cite the bishop before the archbishop, because the citation did not cite the bishop to appear in any Court whereof the laws, canons, and constitutions, take cognizance; second, because the bishop was not bound to appear before the archbishop sitting alone, or before the Vicar-General of the archbishop; third, because the Bishop of Lincoln as a bishop of the Province of Canterbury ought not to be tried for the offences with which he was charged, except by the archbishop and the other bishops of the province assembled either in Convocation or otherwise; and fourth, because the charges in the citation were not such as the bishop was bound to answer or be tried for by any Ecclesiastical Court.

(1) *Ex parte Read*, 13 P. D. 221.

1889

READ v. BISHOP OF LINCOLN.

On March 1, the answer of the promoters was brought in denying the averment of the extended protest.

On the same day the Vicar-General concluded the proceedings.

March 12. The arguments as to the jurisdiction of the archbishop were begun.

Sir W. Phillimore and *Jeune, Q.C.* (*A. B. Kempe,* with them), for the Bishop of Lincoln. There are three objections, raised by the protest, to the jurisdiction of the archbishop as sole judge; first, that he cannot, sitting alone, try, condemn, or sentence a bishop of the province, because the proper tribunal consists of the bishops of the province together with the archbishop, assembled in synod, that is summoned by writ from the Crown to sit in convocation. Secondly, a bishop is not bound by the rubrics of the Prayer Book, so far as they refer to priests and ministers. (1) The Bishop of Lincoln was therefore at liberty to depart from those rubrics, and the citation discloses no ecclesiastical offence, inasmuch as it refers only to acts in respect of which the rubrics are binding on ministers and priests. Thirdly, assuming that the Bishop of Lincoln is not bound by these rubrics, proceedings in respect of the acts charged against him cannot be brought in an Ecclesiastical Court. For they are offences, if offences at all, created by the Acts of Uniformity, and cognizable only by the temporal Courts.

As to the first head of argument. A preliminary point in respect of this head is that the authority of the archbishop before the Reformation, as legate of the pope, must be distinguished from his authority as metropolitan. His jurisdiction as metropolitan must be ascertained by reference to the law of the Church of England, which has been defined as follows: "The law of the Church of England and its history are to be deduced from the ancient general canon law—from the particular constitutions made in this country to regulate the English Church—from our own canons, from the rubric, and from any Acts of Parliament that may have been passed on the subject; and the whole may be illustrated also by the writings of eminent persons." (2)

(1) As to this point, see p. 99, note (2).

(2) Per Sir J. Nicholl, *Kemp* v. *Wickes*, 3 Phill. 276.

See also *Evans* v. *Ascuithe* (1), *per* Dodderidge, J. A further authority is the case of *Reg.* v. *Millis* (2), where dicta to the same effect are to be found.

As regards the canon law. The canons of the first four general councils support the first ground on which the protest is based. They form part of the ecclesiastical law of England, because they have been accepted (*a*) by English synods, (*b*) by Parliament, (*c*) by the Courts. Only such of the general canons as have been accepted in this country are authoritative. The first authority for the statement that these canons have been accepted by English synods is the recognition of the general councils by the council of Hatfield, A.D. 680 (3), the second their recognition by synods of the northern and southern provinces, A.D. 787 (4), the third, their recognition by the canons of Ælfric in A.D. 970. (5) The authorities for the statement that they have been recognised by Parliament are 25 Hen. 8, c. xix. s. 7; 1 Eliz. c. 1, s. 36.

The authority for the statement that these canons have been recognised by the Courts is the case of *Reg.* v. *Archbishop of Canterbury*, in which Coleridge, J., says: "The case on the part of the applicants commenced with evidence offered even from the apostolic ages of the Church. I am content to start from the general councils. I presume the authority of these councils, on a matter of Church government in England before the Reformation, will not be questioned. Even as to matters of doctrine, their authority is expressly recognised by the legislature, after the Reformation, in the Statute 1 Eliz. c. 1, s. 36." (6)

The canons relied on as shewing that the archbishop alone has not jurisdiction to try a provincial bishop, but that the proper tribunal is the synod are Canon 6 of the General Council of Constantinople (7), Canons 1 and 9 of the General Council of

(1) Palm. 457.

(2) 10 Clark & Finnelly, 534, at pp. 678, 680, 745.

(3) Haddan and Stubbs, Councils and Ecclesiastical Documents, vol. iii. p. 142.

(4) Haddan and Stubbs, Councils and Ecclesiastical Documents, vol. iii. pp. 448, 450.

(5) Wilkins' Concilia, vol. i. p. 254; Hook's Lives of the Archbishops of Canterbury, vol. i. p. 444.

(6) 11 Q. B. Rep. 483.

(7) Johnson's Vade Mecum, part ii. p. 129, 4th ed.

1889

READ v. BISHOP OF LINCOLN.

Chalcedon (1), Canons 9, 12, 13, 14 and 15 of the Council of Antioch (2), and Canons 27 and 66 of the Apostolic Canons. (3)

The cases of *Winfrid, Bishop of Lichfield* (A.D. 673) (4), and *Wilfrid, Bishop of York* (A.D. 678) (5), which have been confused by Lord Holt, are authorities in favour of the present contention, as each prelate was removed by the synod and not by Archbishop Theodore. Then follows the case of *Tunberht, Bishop of Hexham* (A.D. 684). (6) Even William the Conqueror when he tried to depose *Wulstan, Bishop of Worcester* (7), summoned a synod for the purpose. In the case of *Jocelin, Bishop of Salisbury* (8), in 1166, the bishops protested against Becket's action in suspending him without their authority, and in that of *Godfrey, Bishop of St. Asaph* (9), in 1175, the archbishop acted with the authority of the bishops in synod. The case of *Nicholas, Bishop of Llandaff* (10), in 1177, has been relied on by a writer, the Archbishop of Spalatro, as shewing that the archbishop had the power of trying and deposing a bishop. But that instance is not in point. There was there litigation between the Abbot of Malmesbury and the Bishop of Salisbury. The Bishop of Llandaff was not a party to the proceedings, and was suspended for not obeying an inhibition or prohibition—in fact, for contempt of Court. There is also the opinion of the Bishop of Winchester at the Council of Oxford. (11) Another authority in 1344 is the statement in a petition of bishops to the king that the pope alone could judge one of them. (12)

(1) Johnson's Vade Mecum, part ii. p. 139, 4th ed.

(2) Johnson's Vade Mecum, part ii. pp. 91, 95, 96, 97, 4th ed.

(3) Johnson's Vade Mecum, part ii. pp. 20, 33, 4th ed.

(4) Anglo-Saxon Chronicle (Roll's Ed.) vol. ii. p. 29. See also Bede's Ecc. Hist. bk. 4, ch. vi. (Bohn's Ed. p. 183).

(5) Eddius Vita S. Wilfridi, cap. lv.-lvi. in Gale Scriptores xv. vol. i. p. 83.

(6) Florentius Wigornensis (ed. Thorpe, 848), p. 38.

(7) Mathew Paris, Chronica Majora (Roll's ed.) vol. ii. p. 40; Historia Anglorum (Arches ed.) vol. i. p. 53.

(8) Materials for Hist. of Becket (Roll's ed.) vol. v. pp. 403, 406, 407, 421.

(9) Haddan and Stubbs' Councils and Ecclesiastical Documents, vol. i. p. 377; Wilkins' Concilia, vol. i. p. 479, n.

(10) Haddan and Stubbs' Councils and Ecclesiastical Documents, vol. i. p. 385.

(11) Malmesbury Historia Novella, lib. ii. 21; ed. Hardy, 1840.

(12) Rotuli Parliamentorum, vol. ii. p. 151; Gibson's Codex Ecclesiasticus, vol. i. ch. vii. p. 129.

In 1359 there was the case of the *Coadjutor Bishop of Hereford*,(1) who was cited by the archbishop to appear before Convocation for neglect of his duties. In 1457 came the important case of *Peacock, Bishop of Chichester*, (2), but this was a proceeding against the books rather than the writer of them, and throughout the proceedings there was no sign of the archbishop having jurisdiction alone; he formed a part of the council.

Next in order follows the case of *Cheney, Bishop of Gloucester* (3), in 1571; the proceedings in it are those of Convocation. Then follows the case of *Goodman, Bishop of Gloucester*, (4), in 1640, who was on the point of being deprived by the archbishop and bishops in synod when he altered his mind and escaped. In 1684 there is the case of *Wood, Bishop of Lichfield*, who was suspended by the official principal of the Court of Arches; this was a civil suit by the executors of his predecessor for dilapidations, which was referred to the arbitration of Bishops of London and Peterborough, and there was also a criminal suit which was likewise referred, and an award was made against the bishop and also a sentence of deprivation by the arbitrators, which was confirmed officially (5)—it is no authority for or against the Bishop of Lincoln, the proceedings were altogether irregular. In 1686 it was attempted to suspend *Bishop Compton of London* through the agency of Lords Commissioners, by virtue of King James' prerogative, for not having himself suspended a priest who had preached a seditious sermon. (6)

In 1672 occurred the Irish case of *Hacket, Bishop of Down and Connor* (7), who was deprived by a species of commission con-

(1) Wilkins' Concilia, vol. iii. p. 45.

(2) Lewis' Life of Peacock, ed. 1820; Hook's Lives of the Archbishops of Canterbury, vol. v. p. 293, *et seq.*; Registrum Abbati Johannis Whethamstede (i. 279, *et seq.*; Roll's Series), Wilkins' Concilia, vol. iii. p. 576; Babington's Preface to Peacock's Repressor; Loci e Libro Veritatum, Passages Selected from Gascoigne's Theological Dict. (Liber Veritatum) by J. E. T. Rogers, Oxford, 1881, pp. 208 et seq.

(3) Strype's Parker, vol. ii. p. 52; For form of excommunication, Strype's Parker, vol. iii. p. 182.

(4) Gibson's Synodus Anglicana (Oxford ed.) pp. 191, 195; Fuller's Church Hist. Bk. x. cent. 17.

(5) Cardwell's Documentary Annals, p. 352. An original extract from the registry of the Arches Court of Canterbury was also read by counsel.

(6) State Trials, vol. xi. p. 1123, *et seq.*

(7) Mant's History of the Church of Ireland, vol. ii. p. 41.

1889

READ v. BISHOP OF LINCOLN.

sisting of the Bishops of Meath, Dromore, and Derry; this case does not shew any exercise of jurisdiction by the Metropolitan alone.

Next, as to the authorities to be found in the writings of authoritative and eminent writers. The writings of M. A. De Dominis, Archbishop of Spalatro, were relied on by Lord Holt in the *Bishop of St. David's Case* for the proposition that an archbishop has the same authority over a suffragan bishop as the bishop over one of his inferior clergy. (1) But this writer is not a sound authority: there is no inconvenience in assembling synods as he asserts, there is no positive law giving sole jurisdiction to the archbishop, and there are no precedents to this effect. The instance which the Archbishop of Spalatro relies on in s. 15, namely, the action of Pope Gregory, is not to the point, that of St. Basil has not been given accurately by him, and is no authority for his statement (2), nor is that of Florentius (3), Bishop of Epidaurus. The book was written to assert the authority of the Metropolitan against the Pope, and with a partisan object. The whole argument in it is based on the idea that the power of synods passed into the hands of the Metropolitans. This may have been so in other countries where synods fell into disuse, but in this country Convocation did not lose its powers, but always exercised them,

The following eminent writers are in favour of the theory on which the protest is based in this case. Of these, the first is Bingham (4), then follows Hooker (5), then Barrow (6), then Roger Twisden. (7) Johnson says of the synod, "this assembly has power to correct and depose bishops" (8); Archbishop Parker (9) is also an authority to the same effect.

(1) De Republicâ Ecclesiasticâ, Bk. iii. ch. 7, ss. 1, 2, 9, 12, 15, 16, 17, 18, 19, 20.

(2) 53rd Ep. of St. Basil.

(3) St. Gregory's Epistles, Bk. iii. Ep. 8.

(4) Antiquities of the Christian Church, bk. ii. ch. 16, ss. 14, 16.

(5) Ecclesiastical Polity, bk. vii. ch. 16, s. 7.

(6) Treatise of Pope's Supremacy, vol. vii. p. 494 (ed. 1830).

(7) An historical vindication of the Church of England in point of schism as it stands separated from Rome, and as reformed primo Elizabeth, p. 25.

(8) Johnson's Vade Mecum (6th ed.) ch. 16, p. 154.

(9) De Antiquitate Britannicæ Ecclesiæ et Privilegiis Ecclesiæ Cantuarensis, p. 37.

The following authorities are of a negative character: that is, the powers of the archbishop are fully enumerated, but that of deposing a bishop is not mentioned, and therefore it may be assumed that it did not exist. They are Strype—Life of Archbishop Parker (1), Mocket (2) (1617), Cosin (3) (1634), Zouch (4), Clarke (5) (1596), and Godolphin (6) (1687). Noticeable also is the letter of Archbishop Sheldon in answer to the Archbishop of Gnesen in Poland. (7) [All the above authorities were examined and referred to in detail.]

The canons of 1604 are affirmative evidence; they give power to the archbishop to suspend a bishop from ordaining priests for a limited time, and even in the case of suspending a bishop from one of his functions only, they require the archbishop to be assisted by another bishop. It would be very anomalous that the archbishop alone should be able to deprive a bishop, but not suspend him from one of his functions. This shews, therefore, that the power of deprivation generally could not exist in an archbishop. (8)

There are also some authorities to be mentioned, which are supposed to be against the Bishop of Lincoln, but are in reality not so. The first is Lyndwood (9), in which the word "prælatorum" means not bishops but abbots; compare on this point the Constitution of Bishop Poore of Salisbury and Bishop Richard of Durham (10), Rolle's Abridgement (11), Viner's Abridgement (12), Speed (13), and Eadmer. (14) A passage in the Year Books (15) which has been relied on as supporting the archbishop's jurisdiction to deprive a bishop for dilapidations is no

(1) Vol. iii. p. 177.

(2) Politia Ecclesiæ Anglicanæ, ch. iv. p. 29 (3rd ed.).

(3) Ecclesiæ Anglicanæ Politia, ch. iii.

(4) Descriptio Juris et Judicia Ecclesiastica Anglicana, pt. iii. s. 3.

(5) Praxis in Curiis Ecclesiasticis, T. 4, T. 5 (2nd ed.).

(6) An Abridgment of Ecclesiastical Laws, ch. ii. p. 18.

(7) Wilkins' Concilia, vol. iv. p. 597.

(8) Canon xxxiii., Canon xxxv., Canon xxxvi., Wilkins' Concilia, vol. iv. p. 353.

(9) Provinciale, App. p. 30, citing Constitution of Archbishop Edmund (1234).

(10) Spelman's Concilia, vol. ii. pp. 145, 170.

(11) Evesque (G.) Investiture I.

(12) Evesque (G.) Investiture I.

(13) History of Great Britain, 2nd ed. p. 446, s. 13.

(14) Historia Novorum (Roll's ed.) pp. 141, 142.

(15) Y. B. 2 Hen. 4, 3 b.

1889

READ v. BISHOP OF LINCOLN.

more than the argument at the bar of counsel; the so-called *Bishop of Salisbury's Case* (1) is no authority, for on investigation it has been found that no Bishop of Salisbury was deprived or tried. Neither is there any authority for Sir Simon Degge's (2) statement to the same effect. Moreover, it appears by the note to the statement that the deprivation is to be judicio episcoporum. Of the best writers after the *Bishop of St. David's Case*, it is sufficient to say that their view of the law is based on that case and adds no weight to it. These writers are Oughton (3), Ayliffe (4), and Gibson. (5) [The above authorities were also examined at length.]

The case of *Lucy* v. *Watson, Bishop of St. David's* (6) is regarded as the main authority in favour of the jurisdiction of the archbishop. But in none of its various stages, nor in any of the courts before which it went, is it any authority. When Bishop Watson appeared under protest it was only to guard his privileges as a peer. The ground of his objection to the archbishop's jurisdiction on February 20, 1699, was that the offences with which he was charged were cognisable by the temporal and not the Ecclesiastical Courts. His appeal to the delegates on February 16, 1700, was dismissed because he took objection to the archbishop's jurisdiction at too late a period. The first prohibition

(1) Godbolt's Rep. 259.

(2) The Parson's Counsellor, pt. i. ch. viii.

(3) Prolegomena, p. 16, s. 11.

(4) Parergon, p. 92 (2nd ed.).

(5) Codex, vol. ii. p. 133, and p. 1006, n.

(6) For the proceedings in the *Bishop of St. David's Case*, in chronological order, see App. to this Report. The proceedings before the delegates are noted in the Delegates' Processes, vols. ccxxvii. pt. i. p. 1; v. p. 208, d.; p. 831, d., and in the Delegates' Assignation Book. The case in the Queen's Bench on the first proceedings for a prohibition is reported 1 Ld. Raym. 447; 12 Modern, 237; and Carth. 484; and the proceedings for the second prohibition, 1 Ld. Raym. 539; those on which the writ excommunicato capiendo was quashed, 2 Ld. Raym. 817. The proceedings for intrusion in the Court of Exchequer were cited from Queen's Remembrancer, Memoranda Roll, Mich. 13 Will. III. mcix.

The proceedings in the House of Lords are reported in 14 State Trials, p. 447, *et seq.*; Dr. Hody's MSS. Lambeth Palace Library, p. 3; Journals of the House of Lords, March 7, 18, 20, 1695–6; Nov. 29, Dec. 4, 6, 1699; March 1, 2, 5, 8, 1699–1700; Dec. 14, 22, 1704; Jan. 12, 17, 21, 25, 1704, 1705. The case is also noted in Luttrell's Diary, vols. iii., iv. and v., and in Burnet's History of His Own Time, vol. iv. pp. 17, 21, 25. (Clarendon Press Ed. 1823.)

was applied for and refused—(*a*) on the ground that the form of execution was bad; (*b*) that the matters were proper for the decision of a temporal court. In the House of Lords, on December 6, 1699, the bishop's application to resume his privilege was negatived by a party vote, and there is nothing to shew that the question of the jurisdiction of the archbishop was involved in the decision. [The learned counsel then criticised the arguments of the counsel before the House of Lords.] The second prohibition was applied for generally, but the decision of the Court is no authority on the present point, because it was not an attempt on the part of the bishop to prove that the archbishop could not pass a sentence of admonition but that he could not deprive. Further, Lord Holt refused the prohibition on the ground that the not taking by the archbishop of third persons to his assistance was not ground for a prohibition, and also because it was without precedent to grant a prohibition to an Ecclesiastical Court if the proceedings therein were contrary to the canons. The appeal to the House of Lords, on March 2, 1700, was rejected, because error cannot be brought on refusal of a prohibition, and it did not involve the present point: and the writ excommunicato capiendo was quashed on a point of pleading.

[They also argued that in the time of Lord Holt the granting of a writ of prohibition was discretionary: *St. John's College, Cambridge* v. *Toddington* (clerk) (1), *Mayor of London* v. *Cox.* (2)]

The *Bishop of St. Asaph's Case* (3) in 1701 is no authority; he confessed his offence and was suspended. The case of the *Bishop of Clogher* (4) is at most of no greater weight than that of the *Bishop of St. David's*, on which it was partly based. But it is opposed in some ways to that case; the tribunal was composed of the Archbishop of Armagh and four bishops of the province, of the remaining three one was the incriminated party, one was dying, and one was abroad. [The learned counsel read

(1) 1 Burr. 159.

(2) Law Rep. 2 E. & I. 239.

(3) Tracts of the Archbishops and Bishops (Lambeth Library Collection), p. 113, K. 17; State Trials, vol. xiv. p. 468; Burnet's History of His Own Times (Ed. 1823) iv. p. 450.

(4) Phillimore, Ecc. Law, p. 91; Stephen's Laws of the Clergy, i. 167; Burns' Ecc. Law (edited by Phillimore) i. p. 415 (R. R.).

1889

READ v. BISHOP OF LINCOLN.

the sentence signed by the archbishop.] Dr. *Stephens*, a writer with exceptional knowledge of Irish ecclesiasiastical law, asserts that all the bishops were summoned to remove any doubt as to the proper tribunal. But the case of the *Bishop of St. David's*, assuming that it decides what the promoters of this suit assert that it does, has been overruled by the Privy Council. In *Long* v. *Bishop of Capetown* (1) it was held that Mr. Long had bound himself to obey the authority of his bishop, the extent of that authority being determined by the laws of the Church of England, so far as they were applicable to the colonies. In the later case, *Ex parte Bishop of Natal* (2), this same consensual jurisdiction, but as between a bishop and his metropolitan, was relied on, but the Privy Council held that it is not incident to the office of suffragan and metropolitan in English law that the latter can deprive a bishop: *Bishop of Natal* v. *Gladstone* (3) is to the same effect. If the archbishop has the power contended for by the promoters, then sede vacante, it is in the Dean and Chapter of Canterbury: Case of the *Dean and Chapter of York* (4), *Parham* v. *Templar*. (5) Having, it is submitted, shewn that the archbishop has not the jurisdiction contended for by the promoters in this suit, it can be proved positively that Convocation is a judicial tribunal with jurisdiction to try bishops and ministers. The authorities for the contention are, Lord Coke (6); *Sawtre's Case* (1400) (7); *Herbert* v. *Seygno* (1402) (8); *Rector of Wortham's Case* (1416) (9); *Richard Walker's Case* (1419) (10); *Tailour's Case* (1421) (11); *Russell's Case* (1424) (12); *Mungyn's Case* (1428) (13); *Hugh Latimer's Case* (1530) (14); *Bishop Cheney's Case* (15); *Bishop Goodman's Case* (16); *Whiston's Case*

(1) 1 Moo. P. C. (N.S.) 411; Broderick & Freemantle, p. 294.
(2) 3 Moo. P. C. (N.S.) 115.
(3) Law Rep. 3 Eq. 1.
(4) 2 Q. B. 1; Rothery's Return, p. 29.
(5) 3 Phill. 223.
(6) Institutes, 4th pt. ch. 74, Of Ecclesiastical Courts.
(7) Wilkins' Concilia, iii. p. 255; Fitzherbert Natura Brevium, ii. p. 269.
(8) Wilkins' Concilia, iii. p. 270.
(9) Wilkins' Concilia, iii. p. 377.
(10) Wilkins' Concilia, iii. p. 393.
(11) Wilkins' Concilia, iii. p. 404.
(12) Wilkins' Concilia, iii. p. 428.
(13) Wilkins' Concilia, iii. p. 501.
(14) Wilkins' Concilia, iii. p. 725.
(15) Strype's Parker, ii. p. 52; iii. p. 182.
(16) Gibson's Synodus Anglicana (Oxford Ed.), pp. 191, 195; Fuller's Church Hist. bk. xi. cent. 17.

(1710) (1). [The learned counsel read the several cases at length with comments.]

The Statute of Citations (23 Hen. 8, c. 9), is not an authority in favour of the archbishop's jurisdiction. It deals not with Convocation but with the Courts of the archbishops, bishops, and other ordinaries: it is intended by it to deal only with spiritual offences, as the refusal of a bishop to institute to a living, to grant a marriage licence, and to prevent the citation of persons out of their own diocese, as for example, the Bishop of London from citing any one within the "peculiar" of St. Paul's who would be subject only to the jurisdiction of the Dean and Chapter. (2)

Sir H. Davey, Q.C., and *Tristram, Q.C.* (*Danckwerts*, with them), for the promoters. The archbishop, sitting with assessors, has jurisdiction to try this case. The case of *Lucy* v. *The Bishop of St. David's* (3) is a final and a binding decision to this effect: the point as to the jurisdiction of the archbishop was taken, not only in the Court of Queen's Bench, but also before the delegates on the hearing of the appeal on February 16, 1700; for the latter tribunal decided that it was "unanimously of opinion that the archbishop had and that this Court hath, jurisdiction in this cause." In the Court of Queen's Bench the personal jurisdiction of the archbishop was directly in issue on the first and on the second occasion. On the second occasion it was decided that the archbishop had jurisdiction to deprive, which necessarily included the minor proposition that he could try. The same question of jurisdiction was directly decided in the House of Lords with the assistance of ten judges; the same points which have been raised in the present case were therefore raised in that of *Lucy* v. *Bishop of St. David's*. (3) The same question of the archbishop's jurisdiction was raised and decided before the Court of Exchequer in the hearing of two informations of intrusion against

(1) Broderick & Freemantle, p. 320; Cardwell's Synodalia, ii. p. 753; 15 State Trials, p. 714. The above cases are also collected: Report of the Ecclesiastical Courts Commission, 1881, App. 2, p. 54.

(2) It was arranged, with the consent of the Court, that the arguments on the two second objections should stand over for the decision on the first objection.

(3) For references, &c., see ante, p. 96, note (3); and for dates, see App. to this Report.

1889

READ v. BISHOP OF LINCOLN.

Bishop Watson and his wife: Q. R. Memoranda Roll. [They referred to passages beginning at p. 7, line 32; p. 11, line 4; p. 13, line 9; p. 15, line 21; p. 19, line 25; p. 21, line 29; p. 27, line 13; p. 27, line 32; p. 31, line 34; p. 39, line 11. (1)] The argument that Bishop Watson failed to take the objection to the jurisdiction in time has no weight, because an objection which goes to the root of the jurisdiction may be taken at any time in prohibition: *Roberts* v. *Humby* (2), *Mayor of London* v. *Cox* (3). The same principle applies to objections in the Ecclesiastical Courts, as an objection to the jurisdiction could be taken before the delegates: *Taylor* v. *Mozley* (4) Consett's Practice of the Ecclesiastical Courts, p. 66; *Lucy* v. *Bishop of St. David's* (2nd appeal to delegates).

The case of *Ex parte Bishop of Natal* (5) does not affect the jurisdiction of the Archbishop of Canterbury, it only decides that as the Queen has no power by letters patent to erect a Court having coercive jurisdiction in a colony, therefore the taking of the oath of canonical obedience by a colonial bishop did not give his metropolitan coercive jurisdiction. As to the canons of the Church—the disciplinary canons of the first four councils have never been received as part of English law, the canons which have been received affect matters of doctrine; and it can only be by shewing usage that authority can attach to them: *Wilson* v. *McMath* (6), *Rex* v. *Archbishop of Canterbury*. (7) Canon 12 of the Council of Antioch (8) is incompatible with the Queen's supremacy and so cannot be part of English law.

[They referred to the recognition of the Canons of the Council of Hatfield (9), by the Synods of the Northern and Southern Provinces (10), and by the Canons of Ælfric (11), and argued that they were only recognitions of doctrine.]

(1) A translation prepared for this case was referred to.
(2) 3 Mee. & W. p. 120.
(3) Law Rep. 2 H. L. 239.
(4) 1 Curteis Rep. 470, p. 484.
(5) 3 Moo. P. C. (N.S.) 115.
(6) 3 Phill. 79.
(7) 11 Q. B. Rep. 649.
(8) Johnson's Vade Mecum, part ii. p. 95, 4th ed.
(9) Haddan & Stubbs' Councils and Ecclesiastical Documents, iii. p. 142.
(10) Haddan & Stubbs' Councils and Ecclesiastical Documents, iii. pp. 448, 450.
(11) Wilkins' Concilia, vol. i. p. 254; Hook's Lives of the Archbishops of Canterbury, p. 444.

As to authorities cited on behalf of the Bishop of Lincoln, the opinion of the Bishop of Winchester at the Council of Oxford (1), is of no value. The complaint of the Bishops to Pope Alexander (2) proves nothing: if anything, it is in favour of the promoter's contention; nor is the letter of Archbishop Sheldon (3) an authority. The case of the coadjutor *Bishop of Hereford* (1359) (4), is an instance in favour of the present promoters, he was, it is true, summoned to appear before the archbishop "in concilio," but the archbishop was and describes himself as "judex:" he at the time merely happened to be sitting in the synod. In the proceedings in the earlier case (in 1177) of the *Abbott of Malmesbury*, the Bishop of Llandaff was suspended by the authority of the archbishop himself, "nos autem suspendimus" are the words in the record. (5) It is contended that in all the cases referred to the archbishop exercised a personal jurisdiction, sometimes having to sit in Convocation, sometimes with assessors: the case of *Bishop Peacock* (6) is a direct instance of the latter fact and a precedent for the present proceedings, for the assessors were the Bishops of Winchester, Lincoln, and Rochester. The cases (7) relied on from *Sawtre's Case* to *Goodman's Case* shew no fixed practice and prove, if they prove anything, that an archbishop cannot try a priest except in Convocation. The cases of *Bishop Cheney*, (8) and *Bishop Goodman*, (9), do not disclose strictly ecclesiastical offences at all, they shew arbitrary usurpations of power.

The opinion of the judges in *Whiston's Case* (10) was not a judicial opinion or a judicial precedent, but no result was attained because, as Bishop Burnet points out, it was not known how the Court was to be constituted. Lyndwood's Provinciale is an authority, for in his comments on this Constitution, he says

(1) Malmesbury Historia Novella Lib. ii. s. 21 (Ed. Hardy, 1840).

(2) Materials for Hist. of Becket, vol. v. pp. 406, 407, 421.

(3) Wilkins' Concilia, vol. iv. p. 597.

(4) Wilkins' Concilia, vol. iii. p. 45.

(5) Haddan & Stubbs' Councils and Ecclesiastical Documents, vol. i. p. 385.

(6) Lewis' Life of Peacock (Ed. 1820), pp. 143–157.

(7) See ante, p. 98, for cases and references.

(8) Strype's Parker, vol. ii. p. 52; vol. iii. p. 182.

(9) Gibson's Synodus Anglicana (Oxford ed.), pp. 191, 195; Fuller's Church History, Bk. xi. cent. 17.

(10) 15 State Trials, p. 714, and see ante, p. 98, note (16).

1889

READ v. BISHOP OF LINCOLN.

in explanation of it, "Prælatorum, sc. episcoporum, qui, etc." (1) Lyndwood was the most eminent of English canonists, and his authority is accordingly great. The Canons of 1604 (2) are in favour of the promoters, for the jurisdiction of the archbishop is assumed, and in some instances they create new ecclesiastical offences, in others they regulate the jurisdiction. The Statute of Citations (23 Hen. 8, c. 9), recognises the jurisdiction of the archbishop, and of the possibility of a bishop being cited before him. Again, in 25 Hen. 8, c. 19, abolishing an appeal to the pope and substituting an appeal to the king in Council from the archbishop, there is no mention of an appeal from Convocation, thus shewing that jurisdiction is in the archbishop alone.

Sir W. Phillimore, in reply. The decision on the information of intrusion is that of Lord Keeper Wright only, though Holt and Trevor, C.JJ., were called in: the only point relied on by the Bishop of St. David's was that he was a Peer of Parliament, this report has therefore no weight as an authority.

Cur. adv. vult.

1889. May 11. THE ARCHBISHOP OF CANTERBURY. Before I proceed to deliver judgment on the protest, I desire to express my very great obligations to the learned and right reverend prelates who are with me, for their goodness in hearing the arguments along with me, and giving me the benefit of their advice on various points. It will be remembered that the appointment of their Lordships as assessors was for the hearing of the case on its merits. The appearance under protest gave rise to a question totally distinct (except on one reserved point) from those affecting the merits, and their Lordships could not be called upon to discharge the office of assessorship, properly speaking, in considering the validity of jurisdiction which potentially affects themselves and their acts. It will therefore be understood that the judgment which I shall presently deliver on that part of the protest which concerns the jurisdiction only, is not to be looked upon as other than my own judgment.

The Court has now to give its decision on the protest raised

(1) Lyndwood's Provinciale, App. p. 30; Spelman's Concilia, pp. 145, 170. (2) Wilkins' Concilia, vol. iv. p. 353.

1889

READ v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

on behalf of the Lord Bishop of Lincoln against the jurisdiction of the Court in this matter.

First, it will be necessary to consider the case stated in the protest; secondly, the authorities and the arguments against and in support of the archiepiscopal jurisdiction; thirdly, to state the conclusion arrived at, and declare the course to be taken upon the decision.

I. The protest says:—1. That the citation issued does not cite the Lord Bishop of Lincoln to appear in any Court or in any proceedings whereof the laws, canons, and constitutions ecclesiastical of this Church and realm and of the Province of Canterbury take cognizance. 2. That by the said laws, canons, and constitutions, the Lord Bishop of Lincoln is not bound and ought not to appear before or be tried by the archbishop sitting alone, or to appear before or to be tried by the Vicar-General of the archbishop; and that the fact that the archbishop proposes to sit with assessors does not confer a jurisdiction which he would not otherwise have. 3. That by the said laws, canons and constitutions, the Lord Bishop of Lincoln as a bishop of the Province of Canterbury ought not to be tried for the offences (if any) with which he is charged in these proceedings, save by the Archbishop of Canterbury together with the other bishops of the province, his comprovincials, assembled either in the Convocation of the said province or otherwise. 4. That the charges set forth in the citation are not such charges as by the said laws, canons, and constitutions, the said Lord Bishop of Lincoln is bound, or ought to be tried for before or by any Court of ecclesiastical jurisdiction. The consideration of this fourth point was deferred, without prejudice to his Lordship's position, until the case (in the event of the protest being overruled) should come to be heard on its merits. By the first three articles of the protest, two questions are raised: (1) Has the archbishop, either sitting alone or with assessors in the Archiepiscopal Court of his province, jurisdiction? (2) Has the archbishop jurisdiction only when sitting together with the other bishops of the province assembled in convocation "or otherwise"? The word "otherwise" is not explained. But the second question (2) would not require consideration if the first (1) were decided in the affirmative. If it

1889

READ v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

were proved that the archbishop has jurisdiction when sitting in Convocation, this would not in itself prove that he has jurisdiction only when so sitting. It is obvious that such jurisdiction might exist concurrently with a jurisdiction exercised by the archbishop alone or with assessors.

II. The arguments in support of the protest and the authorities cited have extended over a wide range. The records of early synods and councils have been much relied upon. As documents ancient, and solemnly accepted, these records deserve all the scholarship and attention with which they have been handled by the learned counsel. Not for this immediate purpose only, but for ourselves always and our beliefs, they have the highest value and weight. It is desirable, therefore, to ascertain, if possible, exactly what kind and amount of support the contention receives from their authority. General impressions are easily created even by raising a contention on such grounds, and then conscientious difficulties gather round those impressions. It is therefore quite worth while to examine in some detail the canons cited, but only for the purpose for which they are cited. The argument which was advanced is very clear and connected. The first canon of the Council of Chalcedon received the canons of "all the holy synods" held before it. The English Church receives the Council of Chalcedon as one of the four general councils. All the canons, therefore, of this and of the earlier synods referred to have become and, if the law has not been altered, are still part of the law of the realm. It is agreed, at the same time, that if the directions contained in ancient canons are ever so clear and definite, they still cannot determine any question of canonical or other law in England unless they have been received and put in use. There is, however, no doubt that in matters of faith and doctrine the decrees of the first four general councils have been so received, as declared in the statute law (25 Hen. 8, c. 13, s. 37; 1 Eliz. c. 1, s. 36). Canons also therein made, when strictly applicable, and when not "contrariant to the law of the Church and realm," have authority.

We proceed then to consider how far this authority extends in the present case. Extracts in support of the view that the canons determine the method of procedure in trial of bishops

1889

READ
v.
BISHOP OF
LINCOLN.

The Archbishop of Canterbury.

were put in by the learned counsel for the Bishop of Lincoln. Among these are two of the canons called apostolic, and other canons of the Councils of Constantinople, Antioch, and Chalcedon. We will take them in order, and consider both their contents and their reception. The canons called apostolic probably belong, in the opinion of the most learned critics, for the most part to a period in which the Crown or Government had entered into no relations with the Church. For this reason, as well as on account of other social changes, many of the most important of these canons nowhere now survive in use, and could nowhere be acted upon in the Catholic Church as it is. Of canon 27 (otherwise 33 or 35), the part which has seemed to touch this question is (as cited by the learned counsel)—"The bishops of every province ought to own him who is chief among them, and esteem him as their head, and to do nothing extraordinary (*περιττόν*) without his consent; but every one those things only which concern his own parish (*παροικία*) and the country subject to it. Nor let him (that is chief bishop) do anything (extraordinary) without the consent of all." (1) But (not to discuss the exactness of this translation) if anywhere the chief bishop has a court and jurisdiction, that which he does regularly within this, in the exercise of that jurisdiction, is not extraordinary. The canon assumes that he has some authority more than diocesan; and to allege the canon generally against a jurisdiction not otherwise proved to be outside this is to beg the question. Again canon 66 (otherwise 73 or 74) directs that the bishops shall summon before themselves any credibly accused bishop, and try to secure his appearing, and shall sentence him. But even if this canon were held now to empower bishops to cite one of their own number before them, it still could have no force to override a jurisdiction otherwise shown to reside in their metropolitan.

Next, as to the reception of these canons in our Church. It was argued that the apostolic canons were held to be included among those adopted by the first canon of the general Council of Chalcedon, and therefore received by the Church of England, and so part of our own law. It is, however, matter of history

(1) Johnson, ii. 19.

1889

READ v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

(I refer to Hefele, "Hist. of Councils," App. vol. i.) that the apostolic canons were adopted by the Synod in Trullo, A.D. 792, under the patriarch John Scholasicus, into the code of the Greek Church. That would not have been necessary if they had been held to have been already adopted by the Council of Chalcedon in A.D. 341. After the Council in Trullo they remained binding on the Greek Church only, until, after having been added to the list of apocryphal books condemned by papal authority in the sixth century (inserted probably by Hormisdas in the Gelasian Decree, Labbe, t. v. c. 390), they regained credit, and the first fifty of them were in the eleventh century added to the orthodox rules (regulis orthodoxis) of the Roman Church. (Hefele, App. vol. i.). It is therefore difficult to see how these two canons, unless they have had some definite reception here, which is not shewn, are not still formally part of "that foreign canon law" as to which Sir W. Phillimore rightly, "as an English lawyer, denied that it could be put into effect." They do not, as we have seen, apply to this case even as to their contents. And if they did, still (precious as they are as illustrations of early Christian practice) they are not part of the discipline of the English Church. We come next to the sixth canon of Constantinople. The reception of this canon is even more questionable. Critics agree that it was not passed at all in the second general council, the Great Council of Constantinople of the year 381, but at the synod which was held there a year later. Four canons only were passed at the council. (Hefele, B. vii. s. 98; Beveridge, Ballerini, etc., App. Hef.) The so-called fifth and sixth were not read apparently at Chalcedon, they are not alluded to by the Greek historians of the council, and were not included in any of the four early Latin versions of its canons, and as late as the year 865, Pope Nicolas the Great writes of this sixth canon to the Emperor Michael at Constantinople, as being "not found among us (in the West), though asserted to be kept among you (in the East)." (Hefele, l. c. and sub can. vi.; Jaffé Regesta P.P.R., sub anno; Nic. I. Ep. 8 ad Michaelem Imp. Proposueram, etc. Labbe, Venet. 1729, v. 9, c. 1321 E.) It was not passed, then, in the Second General Council, there is no evidence that it was sanctioned in the third, and it was not in the code at Rome,

1889

READ v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

nearly two centuries after it has been argued that it was received at Hatfield, and became binding to this day as the law of the English Church. But what is its purport? It excludes heretics, schismatics, and excommunicate persons from bringing ecclesiastical suits against bishops. It excludes ecclesiastical suits against bishops from being instituted in the temporal courts; and from being instituted in general councils (or great synods) except on appeal from the provincial synods which ought to receive and hear such causes. If, then, this canon had been received in England it might probably have been the earliest authority for such jurisdiction in the provincial synod as may possibly exist in it from some source; although that reception could not have excluded concurrent developments which a more organised period was sure to produce in the modes of jurisdiction. But even that probability is extinguished by the evidence that it was not known in the West until long after the Council of Hatfield. We come, thirdly, to the canons adduced from the Synod of Antioch, which, although it was in reality only an Oriental synod, without any representation of the Western Church, has acquired large authority, apparently, as Hefele thinks, through the goodness of its enactments. Of the ninth canon we need not speak; its point has been touched under the Apostolic Canon 27 (33 or 35), of which it is an expansion—unless that is an abridgment of this. Canons 12 (not 11), 14, 15, deal with cases of bishops who have been tried or deposed by synods. They do not order that bishops should be tried only by synods, but they speak of this as the obvious mode of procedure at that time—which of course it was. But the 13th canon was quoted by Sir W. Phillimore as if it did order that mode distinctly. "All is null," he read from Johnson, "that is done by bishops coming without invitation" (i.e., intruding foreign bishops), "and they are to be deposed by a sacred synod." The original will bear no such interpretation. It is *καθῃρημένον ἐντεῦθεν ἤδη ὑπὸ τῆς ἁγίας συνόδου.*" That nearly answers in form to the form of the phrase "ipso facto excommunicated, and not restored until," etc., in our own canons of 1604; and "the Holy Synod" is that then sitting (compare in Canon 14, *ἔδοξε τῇ ἁγίᾳ συνόδῳ*"). So the latest historian of the councils takes it (Hefele). So the early Latin

1889

READ v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

translators: Dionysius Exiguus, "Ex hoc jam damnatus a sancto concilio" (Labbe, t. ii. c. 601, Ven.), and Isidorus Mercator, "tanquam depositus a sancta synodo et propter hujus modi præsumptionem jam prædamnatus" (Labbe, t. ii. c. 609). All men were to regard the intruding bishop as ipso facto deposed by his own act. This was the only sense in which the canon could have been accepted or known in the West, and there is no direction at all for the trial of a bishop by a synod. On the contrary, the 11th canon (which was not quoted) gives a distinct indication, at least in certain cases, of another mode of trial. It provides for a bishop, if necessity arose, transferring his cause directly to the judgment of the Crown (the emperor)—not limiting the kind of cause to civil causes — by permission and with commendatory letters from his metropolitan or comprovincials. Lastly, we come to the General Council of Chalcedon, A.D. 451. I do not understand how the ninth canon can be alleged in support of the contention raised. It is a purely clerical canon, concerned only with disputes and complaints arising among clergy. It places the civil affairs of the clergy, as well as ecclesiastical matters, under the control of the bishops. The highest judicial authority therein named for the greatest causes is the Exarch of the "diocese," as superior metropolitan, or the "Throne" (Patriarch) of Constantinople. (Hefele, B. xi. s. 200, pp. 107–8, Goschler.) It seems needless to say that such a canon has never been received here. But indeed all the canons of Chalcedon, including the first, were applicable only to the Greek Churches. The Western representatives had departed from the council as soon as questions of faith were over, and long before the canons of discipline were passed. These last were all proposed and passed together in the fifteenth session, and it is held that only the first six sessions, those which dealt with matters of faith, had an œcumenical character. To sum up the result of this closer examination of the antient canons alleged in support of the protest, it amounts to this: The trial of bishops by synods is not enacted in them, though this is implied in the English version which was cited of one of the canons of Antioch. Such trial is treated as a usual and obvious function of synods. But deposition in other form, and trial in other form, and before the metropolitan or the patriarch

is already recognised. The conclusion which the Court must draw is that it cannot satisfy itself from the evidence alleged that the authority of early Church councils establishes that the trial of a bishop ought to rest with a synod of bishops only. It is not necessary to repeat what has been observed as to the absence or slightness of the evidence for the reception in the Western Church of the particular canons alleged. The learned counsel argued that all were covered by the first canon of Chalcedon, and although that might be true for the Greek Church, yet the disciplinary canons of that council have never been conceived to have œcumenical authority. I have thought it important to enter minutely into this part of the argument because, when it has been elaborately maintained that the primitive councils alleged command a mode of trial inconsistent with that in use and now proceeding, even if the jurisdiction of the Court be established, a certain prejudice is evoked, which, under present circumstances, it is right to dispel. The Court itself, owing to the character of the protest, has been placed on its defence, as it were, in a singular manner, which would not have been the case had these pleadings been advanced elsewhere. It will be understood that nothing here said impugns the authority of the first four General Councils—"the first perfection," as Hooker calls them, "of so gracious a thing." But their work was twofold, and it is necessary to observe the distinction between the two parts. Their symbols or creeds, their articles of faith, and definitions of doctrine are our rule, as a faithful expression of the sense of Holy Scripture on the great verities. Thus, in the case referred to by Sir Walter Phillimore of *Kemp* v. *Wickes* (1), the authority assigned to the four councils seems limited to matters of faith and doctrine. But the canons of order and discipline passed in those same councils and at less important synods as to matters of ecclesiastical procedure and legal practice are on another footing. The creeds and sacred definitions deal with things eternal. The canons and the discipline deal with things of spiritual concernment, but in temporal regions and for temporary uses. The canons themselves take into account the conditions of their own times and countries.

(1) 3 Phill. 276.

1889

READ v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

So must the ecclesiastical procedure of every age and nation. The procedure and practice of Courts must of necessity vary with the constitution of a country, and the institutions, organizations, and usages of communities, both ecclesiastical and civil. These have been in perpetual movement and life, and those canons as they stand do not now answer to the actual practice of any Christian Church. That is no disparagement of their excellence. They do not claim to bind a scheme of judicature on the Church at large or the Church of ages. They will not bear the strain which this contention puts on them. But whatever system of procedure appears in those canons, it has been argued that the canons form part of the law of the land, inasmuch as they have been accepted in terms by synods of the English Church. Reference was made to the Council of Hatfield, the Synods of the Northern and Southern Provinces in 787, and to the canons of Ælfric. (1) 1. The Council of Hatfield, A.D. 680. The conclusions of the Council of Hatfield (whatever be its authority) had reference, so far as we can ascertain, to nothing but matters of faith and doctrine, unless there was some rearrangement of English dioceses. It was called by the archbishop "in order" (as Dr. Bright accurately says) "to certify the pope as to the orthodoxy of the Church under his rule." (2) Along with other dogmatic declarations it "enforced," he says, "the theology of the five Œcumenical Councils which had then been holden." Its members describe themselves as "we who with Theodore have expounded the Catholic faith." (3) Phrases describing as the one object of their assembly the affirmation of "the right and orthodox faith," "the divinely inspired doctrine," abound in their synodal letter and in Bede's narrative. It is said that Agatho had proposed that it should also examine "de ecclesiasticis statutis" (p. 133), but there is not one word as to the reception of any disciplinary canons, or discipline at all; and this is the more remarkable if there were any theories as to the trial of bishops, because a commissary from the pope attended the council, and at this very moment one of themselves, the great Wilfrid, was at Rome complaining that he had been

(1) Haddan & Stubbs, iii. pp. 135, 153. (2) Early Eng. Ch. Hist., p. 317.
(3) Haddan & Stubbs, vol. iii. p. 141.

1889

READ v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

improperly deprived. The learned counsel next cited the Synods of the North and South, or, as we might call them, the Double Synod of Finchale and Chelsea held in 787 A.D. under the papal legates. (1) These deal with Church order very closely—regulating monasteries, judicial proceedings, marriage, churches, services, &c. They order that any bishop in any way concerned in the death of a king shall be deposed and degraded. But they do not touch the process. They receive the "synodal edicts of the six universal councils (the sixth having now been held), together with the decrees of the Roman pontiffs." We have already examined the original bearing upon the present question of the canons of the Four Councils which we receive, and the two synods neither add new force to them, nor interpret them as interfering with that spiritual jurisdiction already exercised in England. It has been already observed that some of those canons were at this date not received in the West. The other quoted example of synods of the English Church "having so accepted in terms" those canons, that they now "form part of the law of the land," was the canons of Ælfric, A.D. 970. (2) I suppose the contention was serious. But in fact the Canons of Ælfric represent no synod or legislative authority. They are a bishop's charge. A charge written for the use of the Bishop of Dorchester, by Ælfric, his "humilis frater." And there is no more to say about them. There is, therefore, no evidence that the early English synods either formally received or enjoined any special form of procedure in the trial of bishops.

If we examine the early English illustrative instances they bear not only the same negative witness as the documents, but witness which contradicts the contention. The first alleged was that of Winfred of Lichfield. (3) The Anglo-Saxon Chronicle was quoted to prove that he was deprived by a synod, contrary to the nearly contemporary statement of Bede (Bede was twenty years old when Theodore died), that he was deprived by the Archbishop Theodore (Bede, H. E., l. iv. c. 6). If the passage had been genuine the chronicle itself belongs to two centuries after the

(1) Haddan & Stubbs, vol. iii. p. 447.

(2) Wilkins' Concilia, vol. i. p. 250; Johnson's English Canons, pt. i. p. 382.

(3) Rolls' Edition, vol. i. p. 53; vol. ii. p. 29.

1889

READ v. BISHOP OF LINCOLN.

The Archbishop of Canterbury,

event. But the passage is no part of the original Chronicle. The translation may take no notice of the fact, but the critical edition of the original shews the passage to be a late interpolation —mixed with a spurious charter and probably of the twelfth century. In the second instance, that of Wilfrid of Yorke, we have, against all conjectures about synodical action, Wilfrid's own written petition to the pope, given in his own words by his friend and biographer. Wilfrid says that he had been deprived (privatum) by Theodore (of whom he speaks with great veneration), "absque consensu cujuslibet episcopi." It was urged that Wilfrid was "given his place in a synod assembled in Rome," and that, "before he had been ultimately restored he was (thus) recognised by the Pope as a lawful bishop," that is, that Theodore's deprivation of him was not recognised. But the facts are these. Besides the synod in which his appeal was heard, there were two synods at Rome while Wilfrid was there (1); the one in which Wilfrid sate as a bishop was after his restoration; in the synod which was held while he was still under the archiepiscopal sentence he was not present, although its special business was the state of the Church of England, without reference to his own difficulties. Yet more, the Bishop of Toul, who was Wilfrid's travelling companion to Rome, did sit in that synod. So far, therefore, the action of the pope involves a recognition of Theodore's jurisdiction. Lastly, in the sentence of restoration not a doubt is thrown on Theodore's jurisdiction. Wilfrid had asked for a decision as to whether he was "privatus" (p. 138). The sentence was, "Episcopatum, quem nuper habuit, recipiat." The partitioning of Wilfred's diocese into three, which Theodore had carried in council with the king, was affirmed, though the persons appointed to them were to be changed. As the climax of the conduct for which Wilfrid was deprived was his threatening to appeal to Rome, he receives from the pope much commendation for his dutifulness, but he is replaced only in the diminished see. The legendary story of Wulfstan, who was not deprived, and was not tried in any way which could be called synodical, seems to have no bearing on the question except as shewing by what authority Anglo-Saxon and Norman bishops

(1) Haddan & Stubbs, vol. iii. pp. 131, 136.

1889

READ v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

believed that they held their sees (Freeman's Norman Conquest. (1)) The Court has considered also the other instances up to the end of the twelfth century, but they only shew what is unquestioned, and continues to appear, that there was more than one way in which episcopal causes were heard. With respect to the complaint against Becket for suspending the Bishop of Salisbury, it should be observed that it is not rested upon the use or abuse of legatine power, since the complaint is of his acting "absque (episcoporum) consilio," or, as they state it themselves, "priusquam causa comprovincialium aut aliquorum etiam fuisset arbitrio comprobata." It is exactly the same ground as Wilfrid alleged against Theodore, and it has not even been argued that the objection was entertained (Materials for Hist. of Becket. (2)) After reviewing the earliest evidence, the canons, their reception elsewhere, their reception in England, the instances of jurisdiction, the Court fails to satisfy itself that up to that date there was an exclusive jurisdiction over these cases in a synod of bishops. Before we leave this division of the subject, the three passages should be noticed which were cited to prove that the antient canons have parliamentary authority as law in England. The first (25 Hen. 8, c. 19, s. 7), simply continues the authority whatever it was which the canons already possessed. The second (1 Eliz. c. 1, s. 36), relates to the Four Councils only as ruling what was heresy, when they rested on Scripture. Also it has long disappeared from our Statute-book. The third was found in an Exhortation in the Ordinal, where there is a reference to "antient canons" which echo the Scripture precept "not to be hasty in laying on of hands." It was said that the reference is to the second and eighth Apostolic Canons. I do not see the resemblance; but the allusion is undoubtedly to the Fourth Council of Carthage, which is actually referred to by name in one of the old Latin Pontificals in the corresponding exhortation (Martene, Ant. Ecc. Rit. vol. ii. p. 386). It will scarcely be argued that the canon of the Fourth Council of Carthage became English law through that quotation, but if it would not neither would the others. This is all the parliamentary authority advanced.

(1) Vol. iv. p. 379.

(2) Vol. v. pp. 406, 421.

1889

READ v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

But it was argued that English usage shews that at a later time, "The true mode of judging a bishop is not by the archbishop alone, but by Convocation, Council, or Synod, whatever phrase you choose to employ." It had before been put to the Court (and no exception is taken to the statement), that Convocation is a provincial synod or council, and as such has certain judicial functions. Therefore we proceed at once to the consideration of the cases which have been cited as distinct incontrovertible examples of trials of bishops by Convocation. The first case, urged as a forcible proof that the jurisdiction of the archbishop over bishops must be exercised in Convocation is that of the Coadjutor of Hereford in 1393. He was summoned to trial by the archbishop with high assertion (it is said) of his judicial authority, but summoned before Convocation and tried there. It is, however, a case of no importance. The Coadjutor of Hereford was not a bishop; and he was a member of Convocation He was cited to appear before the archbishop at the next Convocation, which he was bound to attend. It is not pretended that the archbishop might not have corrected him by his visitorial power and in other ways, and it is not to be imagined that a Court such as the present would be convened to decide a case of negligence in a presbyter who was commissary to his sick bishop. Many cases found their way, as this did, to Convocation to meet the convenience or feeling of the bishop. Gibson writes thus: "If a bishop in his diocesan Court upon examination did not see cause to deliver over the party accused to the secular power, either the degree or evidence of the crime falling short . . . the person was frequently brought before Convocation." (1) The reluctance of the bishops to hand over the person to the secular arm, and the odium aroused when they did so, are visible through the whole fourteenth century. Convocation did no more in the way of inflicting penalties than the bishop himself could have done if he had chosen. The Calendar of Authenticated Trials for Heresy prior to the year 1533 (2) shews how many cases of this class, in which the process was initiated in Courts of bishops and of the archbishop, came thus before Convocation. The coadjutor's

(1) Synodus Anglicana, ch. xiv. p. 169.

(2) 2nd Appendix Ecc. Courts Comm. Report.

1889

READ v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

case is one of discipline taking the same course. It has no relation to trials of bishops. The second case is that of *Bishop Cheney*, (1) in 1571. But the *Case of Bishop Cheney* is no trial by synod. It is a mere case of wilful contumacy in and against Convocation. At the opening of every Convocation it is declared that all members who are absent without necessary and approved reason will be visited as contumacious with the canonical penalty; "intendimus . . . contumacias eorum qui absentes fuerint canonice punire." The canonical penalty is the "Major Excommunication" (2): and there is an instance of many members being suspended for such contumacy by Archbishop Whitgift, "a celebratione divinorum et omnimodo exercitio ecclesiasticæ jurisdictionis" in 1586 (3). Bishop Cheney avoided signing the Thirty-nine Articles for nine years, from 1562 to 1571 (being "popishly affected"); and wilfully absenting himself from the Convocation which was to sign them (before publication) in the latter year, was excommunicated for contumacy and contempt according to the forms of Convocation (see Strype's Parker. (4)) The suspension of *Bishop Goodman*, (5) in 1640 is equally destitute of any appearance of a trial by synod. It was an act, and an arbitrary and oppressive act, of the President and Houses of Convocation. The account is minutely given in the acts of Convocation for that year. (See Gibson's App., pp. 51 ff.). The signing of the draft canons of 1640 having been fixed for May 29, Bishop Goodman alone of the two Houses refused to sign. Three canonical monitions to him to sign were compressed into the time occupied by the rest in signing. He still refused. The archbishop then not only pronounced (decrevit) that he should be deprived, but ordered his official principal to draft the sentence of deprivation. He then took the sense of the House, which, as well as his own voice, was necessary to the validity of the act. In Convocation of course all bishops are "assistentes," and all have votes. The majority, which was all that was required, was seen to be for deprivation; and Goodman signed. The archbishop then required him to

(1) Strype's Parker, vol. ii. p. 52.

(2) Gibson's Synodus Anglicana, pp. 27, 26.

(3) Gibson's Appendix, p. 163.

(4) Vol. i. p. 51 ff, and Appendix.

(5) See note (4), p. 93.

1889.

READ v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

declare whether he signed "voluntarily, ex animo, without equivocation, evasion, or mental reservation." Goodman replied that he had signed and would say no more. Nevertheless, both Houses pursued the case, and both resolved that now he should be suspended from office and benefice for the "scandal" he had caused. Further, the Lower House petitioned the archbishop that he should be called upon to take a new oath required by the new canon just signed, which had not yet received the Royal assent, and to answer the question which had been put to him. He was ordered not to leave London (Westminster?) until he had taken the oath, and the archbishop then suspended him (cum consensu totius Synodi . . . suspendendum fore decrevit). This all took place in one day and in one sitting. Thus the two instances supposed to establish the trial of bishops before Convocation are, in fact: (1) one of them, a mere putting in execution of the canonical penalty for the enforcement of attendance; (2) the other, in form simply an act of Convocation. It was argued that the voting of the bishops in Bishop Cheney's and Bishop Goodman's cases shewed that they were judicial proceedings. But this is an error; a majority would be necessary in any act of Convocation. The Royal assent to any Act requires the "greater number of the bishops whereof the president to be one." But "in trials before Convocation the members do not vote" (evidence of Dr. Stubbs, Bishop of Oxford, in Ecclesiastical Courts Commission Report, question 1155). The same great historical authority writes (App. (1) to report already referred to, p. 45), "before the Reformation the Provincial Convocation may be fairly regarded as a court attendant on and assessing to the archbishop, discussing cases of litigation or correction which were brought before him therein or were laid by him before his clergy. But we are inclined to believe that so far as jurisdiction was concerned the authority resided in the metropolitan and not in the synod." This passage perhaps may seem to illustrate how the function of Convocation as assessors to the archbishop in the exercise of his jurisdiction may be discharged by certain members of the body. Further, in claiming Convocation (regarded as the Provincial Synod) as the proper Court for the trial of a bishop it was not explained how the

1889

READ v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

necessity for the concurrence of a majority of the Lower House, which is required for the validity of the acts of Convocation, is consistent with the supposed requirements of antient councils that a bishop should be tried by comprovincials only. However, it is not necessary at present to go further into the question. It may also be observed that from the year 1551 to 1662 no authority was likely to be producible bearing either way upon the right of the archbishop, whether in his own court, or in synod, or Convocation, to try a suffragan, for as long as the Court of High Commission lasted all important offenders in causes touching doctrine or ritual were brought before it, as well as persons, whether laity or clergy, accused of immorality or misconduct, recusancy or nonconformity (Hist. App. (1), p. 50). Lastly, while in the beginning of the seventeenth century the opinion of the judges in *Whiston's Case*, given with the reservation that upon argument they might alter their view, is in support of some judicial power in Convocation, it remains uncertain whether they intended that it could be exercised against persons or only against doctrines as in books, and it is in no way adverse to a jurisdiction residing elsewhere as in the metropolitan. (1) The Court therefore holds that while Convocation is a Court of which the president "sedet judicialiter" with the bishop's "assistentes," and while there may be causes, processes, or controversies which would be necessarily and usefully heard and determined there (proper conditions being fulfilled), it has not been established that it is the only proper Court for the trial of a bishop, and no instance of such a trial has been adduced.

It now remains to consider the arguments on the jurisdiction of the metropolitan. The antient canons themselves, within even the seventy years from Constantinople to Chalcedon, shew the tendency towards that centralization which was impossible before the Church emerged from isolation and oppression, and from the first traces of this there appears all through a jurisdiction vesting in and exercised by the metropolitan, sometimes with, sometimes only in a synod, and sometimes separately. Thus we observed that as early as A.D. 451 the highest trials between bishops are to be taken before either the Exarch of the diœcesis or the Arch-

(1) Broderick & Freemantle, pp. 325, 326.

1889

READ v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

bishop of Constantinople. And thus we find still earlier among a small number of bishops who assembled in a counter-synod at Ephesus in A.D. 441 some bishops who "many years before had been deposed for grave causes by their own metropolitans—*πρὸ πολλῶν ἐτῶν ἐπὶ δειναῖς αἰτίαις καθῃρημένοι ἀπὸ τῶν ἰδίων μητροπολιτῶν*" ("Epist. Synod Conc. Eph. ad Cœlestinum," Labbe, Paris, v. iii. p. 364). In England some of the early synods which tried bishops were not synods of bishops or clergy exclusively, and up to the end of the twelfth century sentences pronounced by the archbishop alone, in the exercise of this jurisdiction, are sometimes appealed or protested against to king or to pope, but never set aside (if set aside at all) on the ground that he had no such jurisdiction. It is scarcely necessary to enter upon the question of the legatine jurisdiction, since no cases are alleged as examples of its being employed in trials of this kind. But as it has been suggested that the archbishop might have had powers as legatus natus which he had not as metropolitan, I may refer to the opinion of one of the most competent authorities of our own or other times. The acceptance of the legatine commission by the archbishops "is of less constitutional importance than might at first sight seem probable." . . . (Its) "effect was not the creation of new legatine Courts, but the clothing of the ordinary Courts with some shadow of legatine authority." "England resisted the intrusion of foreign legates, sent from time to time to . . . . supersede the action of the metropolitans. . . . . Not only the kings, but archbishops like Anselm, remonstrated against the aggression. According to Anselm, the archbishops of Canterbury, by the law and custom of the Church, possessed all the rights and powers that were by the delegation of the pope's powers bestowed upon the legates—a statement which, interpreted by history, means that they were customarily free and independent of foreign interference in the administration of their province." "But the practical decision of the investiture controversy . . . . seems to have impressed the English bishops with the belief that it was better to seek for themselves the office of legate than to leave the Church open to arbitrary and mischievous interference from without" (Bishop of Oxford, Historical Appendix (1) II. to Report of Commission on Ecclesiastical Courts, 1883,

1889

READ v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

p. 25). Against the continuous positive evidence of jurisdiction in the archbishop, the letters and extracts put in "On the Powers of the Archbishop," offer at the best, and merely by implication, negative evidence. The authorities from the Year-books do not seem to establish the point for which they are cited. The petition to Edward III. and the reply refer entirely to criminal offences, and are now contrary to the law of the realm. The case of Bishop Pecocke, A.D. 1457, requires to be considered by itself. It offers an example of the difficulties sometimes attending even written contemporary notices by competent persons. These notices, with such other documents as exist, and some later accounts have been examined by many scholars. Still, it remains uncertain whether Pecocke was deprived, or, after appealing to the pope, resigned on promise of a pension from the king. Further, there is a double mode of procedure. After withdrawing from the king's council at Westminster under pressure (which seems something like the waiving of privilege in *Watson's Case*), Pecocke appeared at Lambeth, where the archbishop sate with three bishops described as assessors—Waynflete, Bishop of Winchester; Chedworth, Bishop of Lincoln, and Lowe, Bishop of Rochester—received the books which Pecocke submitted, and delivered them to twenty-four examiners; received their report; condemned six articles which were said to be extracted from the books; caused the condemnation of these to be published at Paul's Cross, and subsequently received Pecocke's formal retractation. All this, which is not a mere reporting on the subject but is judicial, is combined with other proceedings in the King's Council at Westminster, where still Pecocke is said by Whethamstede, "citari coram archiepiscopo;" and there "præsente tam Domino Rege quam multis proceribus," the archbishop gave him his choice between abjuration and death. Whethamstede's observation is that "reformavit (eum) archipræsularis auctoritas." This combination leaves the action of the jurisdictions which were employed to secure the suppression of Pecocke ambiguous. It should be further observed that, this trial taking place in A.D. 1457, the archbishops of Canterbury had held five trials for heresy since the year 1410, sitting with episcopal assessors. In two cases there were also assessors who were not bishops (Calendar of Trials for Heresy,

1889

READ v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

ut sup.). And though in the instruments belonging to the Process (Gascoine) by which Pecocke was tried the archbishop has the usual style of legatus, there is no token that anything was done by virtue of legatine power. Neither is there any allusion throughout the records to Convocation.

Mr. Jeune has urged in evidence of the plea of the non-existence of the jurisdiction under consideration that Archbishop Parker takes no notice of it in the account which he gives of the privileges and prerogatives of the See of Canterbury in his De Antiquitate Ecclesiæ Britannicæ (p. 37, ed. Drake), whilst he gives a minute description of the Courts of Arches, audience and prerogative in testamentary, matrimonial, and other causes, as well as of the peculiar (p. 41) jurisdiction of the see. But here, in fact, lies the explanation. He gives an exact statement of the scope and practice, the officers, and the advocates of courts which were in daily request—"tam late patentis jurisdictionis," as he writes. There was no occasion for him to go into details upon a jurisdiction which, however real and necessary, had not been exercised for more than a century. But he does indicate clearly that there was a wider range of jurisdiction than he actually describes. He not only says that it was the business of the archbishop "provincialia cuncta negotia arbitrio suo moderari et temperare" (p. 43); he goes much farther, and too far. He writes (p. 37): "Archiepiscopi Cantuariensis authoritas non certis atque definitis archiepiscopalis aut metropoliticæ jurisdictionis cancellis concluditur, sed ordinaria, libera, pæneque arbitraria per suam provinciam excurrit et diffunditur." It is impossible to conclude that, when such is his language, Parker excluded suffragan jurisdiction by mere silence when giving the particulars of his every-day courts; and especially while he was at the same time revising the Reformatio Legum. It is unreasonable to suppose that jurisdiction in the case of an accused suffragan was excluded from terms so large; inasmuch as otherwise, large as they are, the most important case of all would be unprovided for, since Convocation had never dealt with or been invoked in such a case. But the Reformatio Legum shews that where it was necessary to codify, Parker and his colleagues expressed themselves in plain terms. That code, begun in 1549,

was "carefully framed by Archbishop Cranmer (Strype's Parker, ii. 62) and the committee, which consisted of thirty-two most eminent bishops, divines, civilians, and common lawyers." After abundant labour spent on it, "the whole code as revised and approved by Archbishop Parker," who had been a member of the committee from first to last, "was made public with the archbishop's consent in (1571) the same year in which the Thirty-nine Articles were signed by Convocation and ratified by Parliament" (Cardwell, pref. to R. L. (1)). It is hardly necessary to remark that it is cited here simply in evidence, not as constitutional authority. Under title De Ecclesia, &c. c. 16, after provision for appeals to the archbishop and for his adjudicating on questions between his comprovincials—"Judex et finitor inter eos esto archiepiscopus"—the article proceeds thus:—"Further, he shall hear and judge accusations against the bishops of his own province." "Ad hæc audiet et judicabit accusationes contra episcopos suæ provinciæ." A more definite direction cannot be conceived, nor a clearer testimony to the settled opinion of Parker at the very time when it is urged that the De Antiquitate shewed he never thought of such a jurisdiction. The Reformatio Legum was published complete in 1571, and the De Antiquitate in 1572. I should add that in title De Deprivatione, c. 4 (Cardwell (2)), it is ordered that, if a bishop is in peril of being deprived for any crime, the archbishop, with two bishops named by the Crown, are to take up the cognizance of the affair. But before we part from the evidence which Parker thus bears to the range and application of the jurisdiction, it is desirable to notice how in his magnifying of the office one point which he wishes to make clear is that along with it the Metropolitical See had received the fullest possible rights of dispensation (De Ant. (3)). The wording of the passage, "totum illud legum rigorem mitigandi jus, quod dispensare dicitur," seems to shew that, in Parker's view, the duty of tolerance was the complement of power. A letter from Parker to Sir William Cecil of April 28, 1566 (Correspond. Parker, L. ccxxv. Par. Soc. (4)), was alleged as shewing the archbishop's own sense that

(1) Page 11.
(2) Page 166.
(3) Page 37.
(4) Page 280.

1889

REID v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

he had no jurisdiction as to suffragans. But read in its connection with the history, that letter is not concerned with jurisdiction, but with the impossibility of enforcing obedience so long as the queen was unwilling to give the help of her Council. Such being the jurisdiction, there is therefore no difficulty as to the canons of 1604. The ground taken by Sir W. Phillimore was that, affirming recent canons made from 1580 onwards, by which the archbishop, first alone and then with an assessor, formed a tribunal, they created a new court expressly for the suspension of bishops. The argument was that this proves that previously the archbishop's was not a court capable of such act of suspension. But it was not the court that was new, but the penalty. Previously it was part of the common law of the Church that a man should not be ordained without a title, unless the bishop was prepared to maintain him; nor without examination of his qualifications and character (see Phillimore, Eccl. Law. (1)) But there had been no penalty under previous enactments, and the scandals are well known which were brought about through neglect of the rule. Accordingly the 33rd and 35th canons of 1604 fix penalties, as the enactments of 1580, 1585, 1597, had done (though shortening the term in one case) in the form of suspension by the archbishop from conferring holy orders. They give to the archbishop (as the court has to be named), according to apparently unbroken precedent, the benefit of assessorship, but only one assessor, since cases so simply proved required no more. In the 36th canon, where the question was mere matter of fact as to whether the candidate had subscribed the three articles, it is simply stated that the bishop who had not required him to do so shall be suspended, without even naming the authority by whom. We must here observe that if Convocation, or the archbishop in Convocation, had really been the proper and usual court for the suspension of a bishop, this could not have failed to be asserted in canons made by the Convocation itself. It is not necessary to examine the general language cited from authors, or from practice books, although they do not all point one way, nor to refer to such great canonists as Thomassin or Beveridge, who were not cited, because no

(1) Page 120.

opinions of the kind can affect the grounds which are before us as fully or more fully than before the writers. The great specific learning and ecclesiastical science of Antonio de Dominis, Archbishop of Spalatro, and Dean of Windsor, even if of his numerous proofs all may not be equally valid, cannot be lightly set aside. His conclusion, after elaborate research and argument, is that the metropolitan "ordinariam jam habere in episcopos suæ provinciæ potestatem," or otherwise that he is "ordinarius admonitor corrector et judex adversus suorum suffraganeorum vel negligentiam vel excessus." The "ordinary power," which was supposed to have been diminished by an Act of Charles I., was restored with certain savings by the Act of 13 Car. 2, c. 12. When Archbishop Sheldon's letter in 1676 is quoted with a view to shew that in his judgment this particular judicial power did not reside in the archbishop because he makes no mention of it, it can scarcely have been observed that neither does he mention the Court of his Vicar-General, nor the Court of Arches, nor the Court of Audience, nor yet that judicial power which it is argued that the archbishop had in synod, Convocation, or other. If Archbishop Sheldon's silence as to the judicial power now under discussion means that it did not exist, then neither did any of the others exist, not even the power in Convocation which is contended for in the protest. Why he omits the formal mention by name of these judicial functions I do not know (perhaps because of the detail necessary to discriminate them), but it is observable that he does say very distinctly that the archbishop "episcoporum in regimine episcopali errata et negligentias corrigit." This cannot have been done without some kind of Court, not proprio motu, or arbitrarily. And Sheldon is not speaking of the visitorial power throughout the province. He deals with that some lines lower down. The case of *Bishop Wood of Lichfield* (1684) tells but little. It was an arrangement. Two suits about dilapidations (in one of which he was plaintiff, in the other the archbishop's office was promoted against him), and a third, brought against him for non-residence, were, by consent, referred to the arbitration of two bishops. The arbitration was allowed and the award confirmed by the Court of Arches, and the sentence, part of which was suspension, was

1889

REID v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

formally pronounced by the archbishop in Lambeth Chapel, a bishop of the province and another bishop (not the arbitrators) being present. In two other cases the learned counsel argued that the resort to special commissions by royal authority shewed that trial before the archbishop was not recognised as a possible course—the cases of *Bishop Compton* and of *Bishop Hacket*. With regard to *Bishop Compton's Case* (1686) it is obvious that James II., intending him to be not only tried but condemned, had no other resource than an ecclesiastical commission. It was hopeless to expect that Archbishop Sancroft would himself execute the king's purpose. There was this further gain in a commission—that, in the absence of the archbishop, it would be presided over (as was the case) by Lord Chancellor Jeffries. In the case of *Bishop Hacket, of Down and Connor*, 1693, we need not resort to the fact that the Bill of Rights did not then run in Ireland in order to explain why it was heard by a commission from the Crown and not by the archbishop. The archbishop, Primate Boyle of Armagh, was incapacited from the performance of public functions. He had taken no part for ten years past even in consecrating bishops for his own province, though six consecrations took place between 1683, when he officiated for the last time (see Records of Consecration of Irish Bishops, supplement to *Irish Ecclesiastical Gazette*, 1866), and 1702, when he died, at the age of ninety-three, "his memory gone, deaf, and almost blind, a mere wreck of the past" (Abbey, "Eng. Church," vol. ii. p. 315). Up to this point, then, no precedent has been found to shew that, either by canon, statute, or usage, Convocation or any synod in the realm has exclusive jurisdiction ousting the jurisdiction of the archbishop to try a bishop of his province. On the other hand, frequent indications and mention, and examples, both indirect and direct, of the exercise from time to time of the archbishop's jurisdiction are found continuously from the earliest times. And when the issue definitely appeared in the case *Lucy* v. *Bishop of St. David's*, the validity of the jurisdiction was distinctly affirmed, and has been accepted ever since. The suit was promoted ex officio before the archbishop, who held his Court in Lambeth Palace, with his Vicar-General, assisted on each occasion by several of the five bishops who were his assessors. Upon

proof being offered, and several witnesses examined on each side, the bishop tendered a protest on the suggestion that matters contained in the articles were of a temporal character. The archbishop overruled the protest. The bishop appealed to the Court of delegates. The appeal when it came on was heard by five peers, five bishops, five common law judges, the judge of the Admiralty Court, and four other doctors. They dismissed the appeal. But pending the appeal, the bishop moved for a prohibition, and Sir B. Shower argued for it, "That it does not appear that the Bishop of St. David's was cited to appear in any Court whereof the law takes notice, for the citation is that he should appear before the Archbishop of Canterbury, or his Vicar-General, in the hall of Lambeth-house, which is not any Court whereof the law takes notice. For the archbishop has the same power over his suffragan bishops as every bishop has over the clergy of his diocese, but no bishop can cite the clergy before himself, but in his Court, and therefore the citation ought to have been in the Arches, or in some other court of the archbishop." (1) The argument may in form not be the same, but in substance is identical with the first ground of protest on behalf of the Lord Bishop of Lincoln. No doubt other grounds were shewn in the *Bishop of St. David's Case* (2), but the prohibition was denied, on all except one article, as to the abuse of a charity. The whole Court held that "the citation was good," and "that as to that which relates to the office of a bishop, the spiritual Court may proceed against him to deprive him." Against sentence of deprivation the bishop appealed a second time to King's Bench for a prohibition; to the Lords for leave to resume his privilege; and a second time to the delegates. The King's Bench, in refusing the prohibition, declared itself with reference to the case "fully satisfied that the archbishop had jurisdiction," that "by the common law he hath metropolitical jurisdiction," and hath "power to deprive." The bishop brought a writ of error before the House of Lords on the refusal of the prohibition by King's Bench. It was not received. In the House of Lords, counsel for both sides and the Attorney-General for the Crown were ordered to be heard before the judges. The question of jurisdiction was fully argued,

(1) 1 Lord Raym. 447. (2) See ante, p. 96, note (6).

1889

REID v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

and the ten judges were unanimous for it. The Lords did not pronounce on that specific point, but refused leave to resume privilege. The delegates (an equally strong Court as before, indeed almost the same) were unanimously of opinion (Rothery) that the archbishop had jurisdiction, confirmed the decree of the archbishop, and remitted the cause to him. After that Bishop Watson retained lands of the see, and the palace. Two informations of intrusion were exhibited before the Court of Exchequer which turned on the lawfulness of the deprivation. Judgment was given against him on both. On the former he appealed to the Exchequer Chamber and judgment was confirmed; on the second to the House of Lords, but did not proceed with his writ of error. Thus by the delegates twice, in the King's Bench twice, in the Court of Exchequer twice, by the Exchequer Chamber, and by the House of Lords twice, judgments were given which in some instances directly, and in others by necessary implication, bore witness to the metropolitan jurisdiction now questioned. A consensus of jurisdictions affirmed and reaffirmed it. The case of *Lucy* v. *Bishop of St. David's* (1) is referred to in Ayliffe's Parergon (2), Roger's Ecclesiastical Law (3), Stephens' Law of the Clergy (4), Phillimore, Ecclesiastical Law (5), Cripps's Law of the Church (6), and by Lord Denman in *Dean of York's Case.* (7) No doubt is thrown on the decisions by any of these authorities. Two new objections are, however, now raised to the authority of the *St. Bishop of David's Case* (1) as a precedent. The one is personal to Lord Chief Justice Holt, and need not be considered. The other is that the absolute appearance to the citation in the first instance was a bar to the bishop's raising the question of jurisdiction subsequently. The Bishop of St. David's and his advisers were not likely to miss this point if it could have been taken before the archbishop with any reasonable hope of success. Sir B. Shower would not have argued the question of jurisdiction if he had thought that the bishop's absolute appearance in the Ecclesiastical Court made

(1) See ante, p. 96, note (6).
(2) Page 92.
(3) Page 107.
(4) Page 907.
(5) Pages 1235, 1359.
(6) Page 97.
(7) 2 Q. B. 1.

such contention useless in moving for the prohibition. Mr. Lucy's counsel would simply have answered Sir B. Shower that the objection was taken too late. The distinction stated by Dr. Tristram is on principle sound. Where the matter is one of form appearance will waive the objection, but where the matter is one of substance, such as jurisdiction in criminal suits, the objection may be taken at any time. "Prohibition may be granted at any time to restrain a Court to intermeddle with, or execute, a thing which by law they ought not to hold plea of . . . . And the King's Court . . . . may lawfully prohibit . . . . as well after judgment and execution as before." (Answer of the judges, Articuli Cleri, Coke 2d Instit. p. 602.) "Where it appears that the matter was not within the jurisdiction of the spiritual Court, a prohibition lies after sentence or before." Comyns' Dig. tit. Prohibition, D. And same title, F, "where the Court has no jurisdiction a prohibition may be granted upon the request of a stranger, as well as the defendant himself." Compare *Taylor* v. *Morley* (1); *Roberts* v. *Humby*. (2) Further, the *Bishop of St. David's Case* (3) is an authority for holding that the archbishop's right to cite a suffragan of the province is not interfered with by the Statute of Citations (23 Hen. 8, c. 9). And therefore it is convenient here to remark on what was said (on one of these later cases) touching that statute. That Act was for the protection of persons resident within and subject to the jurisdiction of the ordinary. And while it provided that persons should not be liable to be cited out of the diocese in which they reside, it makes exceptions in the case where the offence is committed "by the bishop . . . . or other person having spiritual jurisdiction . . . . or by any other person within the diocese or other jurisdiction whereunto he shall be cited." The bishop may be cited out of his diocese. Accordingly, among all the objections raised in the *St. David's Case* (3), the Statute of Citations was not alleged. In the contemporary case of *Bishop Jones of St. Asaph* (4) the steps were these: a complaint from the clergy of the diocese; a metropolitan visitation by commissioners to collect evidence; "a process against the bishop to appear and answer certain articles;"

(1) 1 Curteis' Rep. 481.
(2) 3 Mee. & W. 120.
(3) See ante, p. 96, note (6).
(4) See ante, p. 97, note (3).

1889

REID v. BISHOP OF LINCOLN.

The Archbishop of Canterbury.

allegations by the bishop in vindication; a formal hearing appointed by the archbishop, June 5, 1700; suspension decreed, June, 1701, "for six months et ultra donec idonie [sic] satisfecerit in premissis, et aliter a nobis vel successoribus nostris ordinatum fuerit." His "purgation" was not satisfactory, and the sentence was continued for six months more. No objection was taken at law to the jurisdiction or its exercise. (See Narrative, &c., Lambeth Library, 113 K. 17.) Several other recent cases were cited in the argument besides *Lucy* v. *Bishop of St. David's* (1); for instance, the *Dean of York's Case* (2), (in which, as it happened, prohibition was granted after sentence); *Long* v. *Bishop of Cape Town* (3); *Ex parte Bishop of Natal* (4); *Reg* v. *Archbishop of Canterbury* (5); *Bishop Compton's Case* (6); *Porter* v. *Rochester*. (7) In the case of *Ex parte Bishop of Natal* (4) it was laid down that no coercive legal jurisdiction in cases of heresy was transferred to the Metropolitan of Cape Town over his suffragan bishops either by law or consensually. But neither this nor any of these cases, in the opinion of the Court, shew that the Archbishop of Canterbury has not the jurisdiction as settled in the *Bishop of St. David's Case*. (1) Further, recent authority has confirmed the law as cleared and defined in that case. By the advice of the law officers of the Crown, Sir Christopher Robinson, Sir Robert Gifford (afterwards Lord Gifford) and Sir John Copley (afterwards Lord Lyndhurst), that case was acted upon and proceedings instituted before the metropolitan against the Bishop of Clogher in 1822. (8)

The Court does not enter upon the question of the Vicar-General of the Province of Canterbury correctly acting as judge instead of the Archbishop of Canterbury because it does not practically affect the present case.

The Court has now examined in detail the facts and reasonings which have been submitted to it as ecclesiastically grounds against the validity of its jurisdiction. It desires to express its obligations to the learned counsel on both sides for the learning

(1) See ante, p. 96, note (6).
(2) 2 Q. B. 1.
(3) 1 Moo. P. C. (N.S.) 46.
(4) 3 Moo. P. C. (N.S.) 115.
(5) 11 Q. B. Rep. 483, at p. 649.
(6) 11 State Trials, 23.
(7) Coke, pt. 13, p. 396.
(8) Phill. Ecc. Law, p. 92.

and lucidity with which they have illustrated the subject and fortified their several contentions. The Court finds that from the most ancient times of the Church the archiepiscopal jurisdiction in the case of suffragans has existed; that in the Church of England it has been from time to time continuously exercised in various forms; that nothing has occurred in the Church to modify that jurisdiction; and that, even if such jurisdiction could be used in Convocation for the trial of a bishop, consistently with the ancient principle that in a synod bishops only could hear such a cause, it nevertheless remains clear that the metropolitan has regularly exercised that jurisdiction both alone and with assessors. The cases came all under one jurisdiction, but in many forms: in synods, episcopal, clerical or mixed, in council, in the Upper House of Convocation, with both Houses, in the Court of Arches, in the Court of Audience (some hold), through the Vicar-General, through arbitrators, with one assessor, with three or four or five assessors, alone absque consensu cujuslibet Episcopi, but always, except for some impediment, personally—ob reverentiam officii and ob reverentiam fratris. Nor is it strange that while the jurisdiction is one, forms should be many and cases few. The question now before us is touching the action of the archbishop, sitting together with comprovincial assessors. There is no form of the exercise of the jurisdiction in this country which has been more examined into and is better attested and confirmed.

III. The Court, therefore, although by an entirely different line of inquiry, has arrived at the same conclusion which was arrived at on purely legal principles by the unanimous judgment of the Lord High Chancellor with four judges and five bishops who constituted the Judicial Committee of the Privy Council to advise Her Majesty in August, 1888. (1) The Court decides that it has jurisdiction in this case, and therefore overrules the protest.

Proctors for promoters: *Wainwright & Baillie.*

Proctors for the Bishop of Lincoln: *Brooks, Jenkins & Co.*

E. S. R.

(1) 13 P. D. 221.

1889

REID v. BISHOP OF LINCOLN.

APPENDIX.

DATES OF PROCEEDINGS IN THE CASE OF LUCY *v.* WATSON, BISHOP OF ST. DAVID'S.

1695, Aug. 23.—Citation issued.
„ Oct. 24.—Watson appears, but claims his privilege.
1696, Mar. 7.—Lucy petitions the House of Lords to refuse the privilege.
„ „ 20.—Lords reject the petition on Watson undertaking to waive his privilege.
„ April 2.—Articles.
1699., Feb. 20.—Watson protests to the jurisdiction on the ground that the offences alleged are mostly temporal. Protest overruled. Appeal.
„ Mar. 13.—Commission of Appeal issued.
Easter Term.—Prohibition moved for on the grounds (1) that the case should have been brought in the Arches Court; (2) that the case is one of temporal cognizance. Refused.
„ June 8.—Delegates dismiss appeal.
„ Aug. 3.—Sentence of deprivation.
„ „ 5.—Appeal from sentence.
„ „ 19.—Suspension, pendente lite.
„ Nov. 23.—Watson resumes privilege.
„ Dec. 6.—House of Lords refuses leave to resume privilege.
1700, Jan. 29.—Prohibition moved for on the ground that the Archbishop had no jurisdiction to deprive. Refused.
„ Feb. 13.—Petition to Lords against refusal of Prohibition. Rejected.
„ „ 16.—Appeal to delegates comes on for hearing, "The Council (sic) for the Bishop of St. David's, insisting that the Archbishop had not jurisdiction in this cause; the Court having considered the arguments on both sides, and debated the matter, is unanimously of opinion that the Archbishop had, and this Court hath, jurisdiction in this cause, and doth order the Council to proceed in the same."—Delegates Assignation Book.
„ „ 22.—Delegates confirm sentence.
„ „ „ Petition for Writ of Error.
„ „ 25.—Writ of Error sealed.
„ Mar. 2.—Writ of Error refused by Lords on the ground that none can be brought in cases of refusal of Prohibition.
„ „ 11.—Motion in House of Lords for petition to Crown not to fill up the Bishoprick. Abandoned.
Watson subsequently excommunicated and arrested for non-payment of costs.
1702, Michaelmas.—Writ de excommunicato capiendo quashed.
Information of Intrusion exhibited against Watson in Exchequer. Judgment against him.
Appeal to Exchequer Chamber. Judgment confirmed.
1704.—5.— Writ of Error in House of Lords. Dismissed for want of prosecution.

THE RECEPTA.

1889
July 30.

*Limitation of Liability—Incorrect Register—Evidence—*25 & 26 *Vict. c.* 63, *s.* 54 —17 & 18 *Vict. c.* 104, *s.* 26.

In an action of limitation of liability the defendants by their defence denied that the registered tonnage of the plaintiffs' ship was the correct tonnage, and at the hearing tendered evidence in support of their defence:—

Held, that the evidence was admissible.

THE plaintiffs, the owners of the steamship *Recepta*, claimed to limit their liability, and alleged that her gross registered tonnage was 930·29 tons and no more. The defendants denied that this was the correct tonnage of the *Recepta*, and alleged that it was 988·40.

The statement of claim was supported by the usual affidavit of the owners and by the register of the *Recepta*.

F. Laing, for the plaintiffs. The documents are in order, and the plaintiffs ask for the usual decree according to the provisions of the Merchant Shipping Act, 1862, s. 54. (1)

Aspinall, for the defendants. The registered tonnage of the *Recepta* was not her correct tonnage at the time of the collision; the defendants are entitled to go behind the register and shew what was her actual tonnage at the time: 17 & 18 Vict. c. 104, s. 26. (2) It is desired to adduce vivâ voce evidence on this point.

BUTT, J. I shall admit the evidence.

Evidence was then given by a surveyor of the Board of Trade,

(1) 25 & 26 Vict. c. 63, s 54: "... such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage without deduction on account of engine-room."

(2) 17 & 18 Vict. c. 104, s. 26: "Whenever the tonnage of any ship has been ascertained and registered in accordance with the provisions of this Act, the same shall thenceforth be deemed to be the tonnage of such ship, and be repeated in every subsequent registry thereof unless any alteration is made in the form and capacity of such ship, or unless it is discovered that the tonnage of such ship has been erroneously computed; and in either of such cases such ship shall be remeasured, and her tonnage determined and registered according to the rules hereinbefore contained in that behalf."

1889

THE RECEPTA.

who had surveyed the *Recepta* at the request of her owners soon after the collision, in support of the defendants' allegation.

Laing, for the plaintiffs, asked for an adjournment to answer this evidence.

BUTT, J. I will allow an adjournment for a week.

Subsequently

Laing, for the plaintiffs, stated that he did not propose to give evidence in reply, and

BUTT, J., made the usual decree; the tonnage of the *Recepta* to be taken as proved by the defendants.

Solicitors for plaintiffs: *Botterell & Roche.*
Solicitor for defendants: *W. Batham.*

E. S. R.

June 24.

[IN THE COURT OF APPEAL.]

THE WESTBOURNE.

Salvage—Agreement—Supervening Circumstances.

The plaintiffs' steamer fell in with the defendants' steamer, which was disabled, about 260 miles from Gibraltar, and sixty miles from Carthagena. The weather at the time was described as "moderately" bad. An agreement was entered into between the captains of the two vessels by which it was agreed that the defendants' steamer should be towed to Gibraltar for the sum of 600*l.*, and that she should provide ropes and hawsers. The next day the weather became much worse, the wind blowing like a hurricane. The hawsers were several times broken, and, at length, one sound rope only was left. The plaintiffs' steamer, therefore, towed the disabled vessel to Carthagena instead of to Gibraltar. In an action of salvage Butt, J., *held,* that the contract had been put an end to by supervening circumstances, and awarded the salvors 900*l.* The defendants appealed:—

Held by the Court of Appeal, that the circumstances had made the service wholly different from that contemplated by the parties; that the Court had authority to deal with the question as though no contract had been made; and that the decision of Butt, J., was therefore right, and must be affirmed.

APPEAL from a judgment of Butt, J., in an action for salvage. The plaintiffs were the owners, master, and crew of the steamship *Howick,* and the defendants the owners of the steamship

1889

THE WESTBOURNE.

Westbourne. At 5.40 P.M. on November 2, 1887, the *Howick* fell in with the *Westbourne* 260 miles from Gibraltar, and sixty miles from Carthagena: the *Westbourne* was in distress, having lost her propeller. She was laden with grain, and at the time some of the cargo had shifted, or did so later on. The weather was moderate. An agreement was then entered into between the masters of the *Howick* and the *Westbourne*, by which the *Westbourne* was to be towed to Gibraltar for the sum of 600*l.*, the *Westbourne* to find the hawsers. The towing began on these terms, but next morning the weather became much worse, the wind being described in the log of the *Westbourne* at 6.40 A.M. as "blowing a complete hurricane." Two steel hawsers and a Manilla rope had been sent on board the *Howick* for the purpose of the towage; one steel hawser was carried away soon after the towage began, and the other about 2 A.M. on November 3, and the towage was continued with the Manilla hawser. Later in the morning this hawser also broke, and another steel and a Manilla hawser were put on board. About 9 A.M. on the same day the steel hawser broke, breaking the thigh of the second officer of the *Howick* and injuring a seaman. This hawser was again made fast, and again broke, so that the towage had to be continued with the Manilla hawser alone. Subsequently the course of the *Howick* was changed so as to take the vessels to Carthagena, the master of the *Westbourne* remonstrated at this change, but the master of the *Howick* signalled that it was impossible to take the *Westbourne* to Gibraltar; and he accordingly towed her to Carthagena, arriving there in the evening of November 3. At Carthagena the master of the *Westbourne* voluntarily signed a document which contained the following passage: "The said steamship *Howick* commenced towing to Gibraltar, but owing to the high winds, heavy seas, breakage of tow-lines, and the serious injury to part of the crew, the captain of the *Howick* found it impossible to proceed, and headed for this port, Carthagena, that being the nearest safe port."

At the trial Butt, J., asked the advice of the elder brethren as to whether under the circumstances it was possible for the *Howick* to fulfil her contract, and they answered that it was impossible. The learned judge thereupon held that the contract having

1889

THE WESTBOURNE.

been put an end to by supervening circumstances, the Court was free to award as salvage such an amount as might appear to be reasonable, and he therefore awarded 900*l.*

The defendants appealed.

Sir W. Phillimore (*Raikes*, with him), for the defendants. The plaintiffs were not entitled to a larger sum than 600*l.* The service as originally stipulated for might have been performed.

A contract to perform a salvage service is a contract involving risk, and the parties take their chance of bad weather. It therefore differs from a simple towage contract, and cannot be put an end to by supervening circumstances: *The True Blue* (1); *The Minnehaha* (2); *The Waverley.* (3) If there was any change in the terms of the contract it was only the substitution of Carthagena for Gibraltar, the amount of the reward remaining the same.

Barnes, Q.C., and *Aspinall*, for the plaintiffs, were not called on.

LORD ESHER, M.R. I am of opinion that the agreement entered into by the masters of the *Howick* and the *Westbourne*, was a towage agreement, but entered into whilst the *Westbourne* was in such exceptional danger that she required salvage assistance; it was thus a towage agreement to do work in the nature of a salvage service. If that agreement became more difficult to carry out by reason of succeeding circumstances, the Court could not therefore alter it. But if, by reason of circumstances over which the salvors had no control, the difficulty of the service was so far increased as to make it in fact a wholly different service from that which was originally contemplated by the parties, or a service of a wholly different class, then the Court of Admiralty has a right to deal with the case as if the original agreement had not been made, and to make such an award as under the circumstances it may think right. In the present case at the time this agreement was made there is no doubt that the weather was bad, but it was weather which has been described as "moderately" bad. The *Westbourne* was, however, so damaged that although she could sail she could not steer. She was, there-

(1) 2 W. Rob. 176. (2) Lush. 335.
(3) Law Rep. 3 A. & E. 369.

1889

THE WESTBOURNE.

Lord Esher, M.R.

fore, in manifest danger, and could only be placed in a position of safety by being towed into a port, and by the agreement in question that port was to be Gibraltar. But after this contract —whether regarded as a towage or a salvage contract matters not—was made, circumstances supervened putting it quite out of the power of the *Howick* to fulfil the original contract. The evidence on this point is conclusive, and supports the finding of the Trinity brethren in the court below and the judgment of Butt, J. After the ship had been taken in tow, without any fault, without any negligence, and without, as now argued before us, any equivocal manœuvre on the part of the towing vessel, the ropes which were made fast to her broke one after the other. What caused them to break in that way? Why, the captains of the two vessels say that the wind had continued to increase until it became most violent. The evidence of the mate seems to be perfectly clear and distinct. He also put the facts down in the log at the time. In court, however, his story is this—that the weather was comparatively moderate when the agreement was made, but it turned to weather which could be properly called nothing else than a hurricane, and that hurricane made the ship roll so much that she took in so much sea over her decks that it was from time to time impossible for anyone to remain on deck. The cargo shifted, and the vessel listed. It has been said that that she listed six feet, but that is probably an error. The captain and the mate both agree that she listed three feet, so that you have a vessel with her cargo shifted so much that she lists three feet. You have rope after rope, without any fault of the *Howick*, breaking. What from? Why, from the severity of the weather which had come on. The very parts of the vessel to which any other ropes would probably have been made fast had broken away so that by the increase of the weather the circumstances had been wholly altered, and altered to this extent—that in my judgment, the ship, which was not in imminent danger before, although in a condition of helplessness, was put into a position of imminent danger. If the *Howick* had left the *Westbourne* at that time she would probably have been lost. By the contract the *Howick* had put herself in such a position that she was bound to remain by the other ship if she could. But the

1889

THE WESTBOURNE.

Lord Esher, M.R.

nature of her service had so altered, that instead of towing a helpless ship, she was towing a ship in imminent danger and with only a single rope. I am of opinion that if she had continued to tow her towards Gibraltar she would not only have placed her tow in more imminent danger, but would have been in imminent danger herself. Then the *Howick* could not, under such circumstances properly tow the vessel upon the course that was originally agreed upon. She could not with safety attempt to tow her to Gibraltar. She was bound to go away from that course altogether under the wholly different circumstances which had arisen. It had thus become practically impossible for her to carry out the original contract. The nature of the circumstances was altered, and the service had become different. The ship was in such danger that she required to be saved promptly, and she was saved by the prudence of the salvors. Under those circumstances the Court of Admiralty had authority to deal with the question as though no contract had been made. If that is so, it is not suggested that the reward given by the Court below is an exorbitant sum. In my opinion, therefore, the appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. The contract was that the *Westbourne* should be towed to Gibraltar for 600*l.*, that being the sum to be paid to tow her under ordinary circumstances. She was not to go round the coast by Carthagena, but was to go direct to Gibraltar. The next material point is the finding of the learned judge, that it had become practically impossible to go on to Gibraltar, with this I entirely agree. This really disposes of the case, and I think the decision is governed by *The Waverley* (1) and similar cases.

BOWEN, L.J. I am of the same opinion. The first question is, what was the contract between these parties? Was there an agreement that the *Westbourne* was to be towed to Gibraltar in any way in which the *Howick* chose to take her, or was it that she was merely to be towed to Spanish territory? I am of opinion that it was that she was to be towed to Gibraltar direct.

(1) Law Rep. 3 A. & E. 369.

It may be that if the contract in question had been performed by going round the coast, and the *Westbourne* had taken but very little advantage of that mode of altering the contract, her owners could not afterwards have complained. But the contract was that she should be towed direct to Gibraltar—not to Carthagena, and then to somewhere else, and then to Gibraltar. There was this further element in the contract, that it was to be performed in a particular way, the ship which was to be towed finding ropes for the ship which was to tow her. Now, as soon as we come to the conclusion that these were the terms of the contract, then the case really ends. It was a contract to tow one vessel on the high seas from one place to another in a particular way. I have no doubt that the ship which was to be towed and her cargo were in a position of danger. If circumstances supervened which rendered the service impossible, there was an end to the contract, and if the ship was brought into safety afterwards it was by the services which the *Howick* rendered her. Supervening circumstances did in fact make the fulfilment of the contract more onerous than had originally been contemplated. The learned judge has found that it became actually impossible to perform the service in the way which had been agreed, and it was then performed in the only other way which remained possible. That it was reasonably possible in a nautical sense for the *Westbourne* any longer to be towed from her position on November 3 to Gibraltar in the weather which prevailed I do not believe. It may be said, therefore, that circumstances rendered it impossible, or, perhaps, it would be more correct to say that the act of God rendered it impossible that that contract should be completed. This case has, therefore, been rightly decided by the Court below.

Appeal dismissed.

Solicitors for plaintiffs: *H. C. Coote & Ball.*
Solicitors for defendants: *Waltons, Bubb, & Johnson.*

E. S. R.

1889
July 10.

[IN THE COURT OF APPEAL.]

THE CALLIOPE.

Ship—Damage—Wharf—Obstruction in Bed of River—Negligence.

By charterparty it was agreed that the plaintiffs' vessel should load a cargo of iron ore; proceed to Newport, Monmouthshire, and deliver the cargo as directed by the consignees or their agent. By the bill of lading, which incorporated the conditions of the charterparty, the cargo was to be delivered to named consignees or their assigns. The bill of lading was indorsed to the defendants, who were proprietors of a wharf on the river Usk at Newport, and lessees of part of the bed of the river in front of the wharf. The vessel proceeded to Newport, and was ordered by the defendants to discharge the cargo at their wharf. It appeared that there were two berths at the wharf, the first alongside the wharf and the second outside the first berth. In the space between the two berths a ridge of mud had been allowed by the defendants to accumulate. The plaintiffs' vessel, while approaching the wharf, struck upon this ridge and was damaged:—

Held, that the space between the two berths must be considered as part of the frontage of the wharf, that it was therefore the duty of the defendants to keep such space in a reasonably safe condition or to give due warning of its being in a dangerous state, and that they were liable for the damage sustained.

Appeal by the plaintiffs from a judgment of Butt, J.

The plaintiffs were the owners of the steamship *Calliope*, and the defendants were the Tredegar Iron and Coal Company, Limited. The *Calliope* was chartered by the Decido Iron Ore Company to load a cargo of iron ore and proceed therewith to Newport, Monmouthshire, and deliver the same when and as directed by the consignees or their agents. By the bill of lading the cargo was made deliverable to the Decido Iron Ore Company or their assigns, all the conditions of the charterparty being incorporated in it. The bill of lading was indorsed to the defendants, who, at the time, were the owners of a wharf on the river Usk at Newport, and leaseholders of a part of the bed of the river fronting such wharf. In accordance with the charterparty and bill of lading the *Calliope* proceeded to Newport and arrived off the Alexandra Dock on May 29, 1886. The defendants ordered her to their wharf to discharge the cargo. At the time there was a pilot on the *Calliope*, though pilotage was not compulsory on this vessel. The pilot stated to the captain that there would not be sufficient water to reach the wharf, and the

1889

THE CALLIOPE.

Calliope therefore proceeded down the river, and anchored in the roads, and the captain sent a message to one Griffith at the wharf, on the advice of the pilot, stating that the *Calliope* could not reach the wharf. In reply the captain received from Griffith the following note: "You can bring your steamer to the Tredegar Wharf, Monday morning's tide; you can tell the pilot we have two feet more water at our wharf than Bathurst Basin." At the wharf there were two berths, one alongside the wharf, and another outside of this berth. These berths were made by vessels lying in the mud, and between the two a ridge of mud had been raised. This ridge was sometimes scraped away by the defendants' servants. On May 31 (Monday morning) the *Calliope* attempted to come up to the wharf, but grounded on the ridge in question, which was then in existence, and was seriously damaged.

It was in respect of this damage that the action was brought.

Butt, J., gave judgment for the defendants on the ground that the cause of the accident was the endeavour of the pilot to take the *Calliope* to the wharf when there was not sufficient water. He also held that Griffith had no authority from the respondents to make the representation and give the orders which he did.

Barnes, Q.C. (*Robson*, with him), for the plaintiffs. The defendants are liable for the damage to the vessel. They were bound upon the true construction of the bill of lading to order the vessel to a safe place. Moreover, as wharfingers, there was a duty on them to have the front of their wharf in such a state that vessels might safely approach it: *The Moorcock.* (1) Griffith had clearly an implied authority from the defendants to superintend the berthing of vessels going to the wharf.

Finlay, Q.C., and *J. Walton*, for the defendants. *The Moorcock* (1) is distinguishable, it refers only to the actual place in which a ship lies, not to the approach to the berth. The responsibility for the accident is on the pilot, who should have known the depth of water.

LORD ESHER, M.R. This action must be considered as an action of negligence, and not merely as one for misrepresentation by a person for whom the defendants are responsible. Therefore

(1) Ante, p. 64.

1889

THE CALLIOPE.

Lord Esher, M.R.

there must be some duty on the part of the defendants established and some breach of it by them to enable the plaintiffs to succeed. It has been proved that the defendants are the assignees of a bill of lading, under which they had a right to direct this vessel to go to any place at Newport which they might point out, and they ordered her to go to a wharf of their own and there discharge her cargo. If they had ordered her to go to a place to which she could not get, they would then have been liable to pay demurrage. But here they ordered her to go to their own wharf, of which they were owners; they were also leaseholders of the bed of the river adjacent thereto. To make a wharf of any use there must be a water frontage to it. Of what does the frontage consist? Not of the space to a distance of half a mile from the wharf, but practically of that portion of space through which vessels must come before they can lie at the wharf, and, of course, of the space in which to lie. In the present case there was a berth close to the wharf, so that a vessel in that berth would be made fast to the wharf, and another berth outside the first one, in which a vessel would be made fast to the ship nearest the wharf, or to the latter by ropes brought across the nearest vessel. Both berths form part of the frontage of the wharf, and therefore the part between them would also be a portion of the frontage. Then the question arises, has the owner of the wharf who allows persons to use it, any duty in regard to the frontage of the wharf? Is he to be allowed to have the frontage in any state which he pleases, and to allow vessels coming to the wharf for his benefit, to find out for themselves whether they can get to it in safety or not. In *The Moorcock* (1) we held that the wharfinger must take reasonable care that the front of his wharf is in a state of safety, or, if it is not, warn persons who have to use it that it is unsafe, it was not necessary to decide that there was a warranty by the wharfinger that the wharf was safe.

The present case is, however, stronger than that of *The Moorcock* (1), because here the ship was bound to go to the defendants' wharf by contract, in the former case the ship could use the wharf if she pleased. It has been argued that the pilots at Newport would be acquainted with the state of the river, and

(1) Ante, p. 64.

therefore that the wharfinger had no duty in respect of it towards the shipowner. But as the captain may or may not take a pilot this argument cannot be good.

Lord Esher, M.R.

We decided in *The Moorcock* (1), as I have said, what the duty of the wharfinger was. Is that duty confined to the place close to the wharf? Or is the wharf-owner liable for damage done to a ship by grounding upon a place which is in a dangerous state and over which she must necessarily go to get into the berth at the wharf? In my opinion the duty of the wharfinger extends to that part of the frontage as well as to the actual spot where the ship will finally lie, and his duty is to keep it reasonably safe or to tell those coming to his wharf that it is not safe.

[The Master of the Rolls then examined the evidence as to the formation of the ridge already mentioned, and found that the defendants ought to have removed it, he also examined the evidence as to whether there was a want of reasonable care on the part of those in charge of the *Calliope*, and held that there was no want of reasonable care, and concluded.]

For all the above reasons I am of opinion that the plaintiffs are liable for the damage done to this vessel, and that this appeal must be allowed.

COTTON, L.J. I am also of opinion that the defendants are liable, and that the judgment of the Court below must be reversed.

The defendants were the lessees of the wharf in question, and the *Calliope* grounded on a ridge near to it; this was caused by the defendants mooring for their own purposes vessels opposite their wharf in such a way that there was an accumulation of mud, which grew higher and higher and harder and harder between the two berths. I agree with the Master of the Rolls that this part of the bed of the river must be treated as a portion of the frontage of the wharf, because it is between the two berths at which vessels usually lie at the wharf. In my opinion the defendants were answerable for what happened in this place, and they had a duty on them towards persons whose ships came there, or, at the least, they were bound to warn persons so as to prevent them putting

(1) Ante, p. 64.

1889

THE CALLIOPE.

Cotton L.J.

their ships in danger. I am of opinion, therefore, that it was a breach of this duty which caused the accident to the plaintiffs' ship. [The Lord Justice then examined the evidence as to whether the plaintiffs had been guilty of contributory negligence, and held that they had not.]

LINDLEY, L.J. I am of the same opinion. The learned judge in the court below failed to attribute sufficient weight to the fact that the ship was injured by grounding on the ground of the defendants. That ground was uneven, and the defendants knew that it was liable to become uneven. The *Calliope* grounded because there was not water enough for her to cross the ridge in question, which it was the duty of the defendants to remove. The ship grounded, in my opinion, without any negligence on the part of those in charge of her, and therefore the defendants are liable for the damage she sustained.

Appeal allowed.

Solicitors for plaintiffs: *Downing, Holman, & Co.*
Solicitors for defendants: *Pritchard & Son.*

E. S. R.

June 1, 18.

THE STETTIN.

Bill of Lading—Goods to be delivered to named Consignee or his Assigns—Duty of Shipmaster—Delivery of Goods without production of Bill of Lading—German Law.

Where by the terms of a bill of lading the goods are to be delivered to a named consignee or his assigns the master is not entitled to deliver the goods to such consignee without the production of one of the parts of the bill of lading.

The plaintiffs shipped goods in London on board a German vessel belonging to the defendants, under a bill of lading, drawn in two parts, by which the goods were to be delivered at a German port to the consignee named in the bill of lading or to his assigns.

The master delivered the goods at the port of discharge to the consignee without the production of either part of the bill of lading:—

Held, upon proof that the German law did not essentially differ from the English law, that the defendants were liable for wrongful delivery of the goods.

ACTION (transferred from the City of London Court) by the plaintiffs, Sir Charles Price & Co., against the defendants, the

owners of the steamship *Stettin*, for damages for wrongful delivery of goods.

1889

THE STETTIN.

On June 18, 1888, the plaintiffs shipped fifty-seven barrels of seed oil on board the steamship *Stettin*, a vessel registered in accordance with German law under the German flag, and trading between London and Stettin.

The material portion of the bill of lading, dated June 19, and drawn in two parts, was as follows:—

"Shipped in good order and condition by Sir Charles Price & Co. on board the steamship or vessel called the *Stettin* . . . . now lying in this port bound for Stettin . . . . fifty-seven barrels of seed oil . . . . to be delivered subject to the exceptions and conditions hereinafter mentioned in the like good order and condition from the ship's deck, where the ship's responsibility shall cease, at the port of Stettin unto S. Mendelsohn, or to his or their assigns, he or they paying freight for the said goods in London . . . . the goods to be taken from the ship by the consignees as soon after arrival as the vessel is ready to discharge, or the same may be transhipped into lighters and (or) landed on the quays and (or) warehoused, all at the expense and risk of the owners of such goods."

"In witness whereof the master or agent of the said vessel hath affirmed to two bills of lading exclusive of the master's copy, all of this tenor and date, one of which bills being accomplished the others to stand void."

On the same day (June 19) the plaintiffs wrote to S. Mendelsohn, who carried on the business of a forwarding agent in Stettin, and was the consignee named in the bill of lading, advising him of the shipment of the goods by the *Stettin* for Julius Manasse, Breslau.

On June 25 the vessel arrived at Stettin, and the master delivered the goods to Mendelsohn, who on the following day sent them by lighter to Julius Manasse, at Breslau.

The plaintiffs retained one part of the bill of lading, and on June 22 forwarded the other part to A. Tiesler, the representative of the plaintiffs in Breslau, who handed it, together with the invoice, to Julius Manasse, but, owing to the alleged non-fulfilment of the contract of sale, Tiesler obtained the bill of lading

1889

THE STETTIN.

back again from Manasse, the goods having been meanwhile shipped by Mendelsohn to Manasse at Breslau.

On July 3 the plaintiffs paid the defendants in London £5 18s. 7*d.* freight for the carriage of the goods, and on July 5 they telegraphed to Mendelsohn asking if he had delivered the goods to Manasse without getting the bill of lading, to which Mendelsohn replied by telegram of the same date that the bill of lading not being made out to "order" he had complied with the instructions of the plaintiffs, and delivered the goods to Manasse.

Evidence as to the German law bearing on the delivery of goods under a bill of lading was given by German advocates called by both the plaintiffs and the defendants.

According to the plaintiffs' witnesses, the bill of lading being to a consignee or his assigns was a negotiable instrument equivalent to a bill of lading to order, but whether the bill of lading was negotiable or a "namens connossement," that is a bill of lading made out to a named consignee only, and not negotiable, the contract of the master was to deliver to the holder of the bill of lading. In any case, the named consignee acquired no right to the goods without the bill of lading, and the master was bound to insist on the production of the bill of lading before delivering the goods. Any custom at the port of Stettin for the master to deliver goods to the consignee without production of the bill of lading would be bad, as, under art. 1 of the German Mercantile Code, customs only hold where there is no express provision of the law affecting the question.

Arts. 646, 647, 652, 661 of the German Mercantile Code (1)

(1) Art. 646. (Wendt's translation). "When no agreement to the contrary has been made, the bill of lading can be issued at the demand of the shipper to the order of the consignee or simply to order. In the latter case, the word 'order' means the order of the shipper . . . ."

Art. 647. "The master is bound to deliver the goods in the port of discharge to the legal holder of even one copy of the bill of lading only. As legally entitled to receive the goods, is to be considered the party who is designated as consignee in the bill of lading, or to whom the bill of lading, in case it is issued to order, has been transferred by indorsement."

Art. 652. "The master can only be obliged to deliver the goods upon return of a copy of the bill of lading upon which the delivery of the said goods is duly certified."

Art. 661. "After a bill of lading has been issued to order, the master cannot comply with any instructions

were referred to, and the commentaries on the code by Lewis (vol. i., pp. 295, 296), Endemann (pp. 175, 179), and Goldschmidt (p. 721), also a case in the Decisions of the High Court (vol. xv., p. 228), deciding that the consignee mentioned in art. 647 is the consignee holding the bill of lading.

According to the defendants' witnesses there is no express provision in the German code requiring the production of the bill of lading, and in the case of a bill of lading with a named consignee (namens connossement) a German shipowner would fulfil the contract of carriage towards the shipper by delivering the goods to such named consignee without calling for the production of the bill of lading, as the master has in his possession the ship's copy of the bill of lading bearing the name of such consignee. The word "assigns" is not used in a German bill of lading, but a bill of lading so worded is equivalent to a bill of lading to the order of the named consignee. If such a bill of lading were retained by the shipper, never indorsed by the consignee, and there was no notice from the shipper to the master not to deliver the goods, the shipowner would equally fulfil his obligation towards the shipper by delivering the goods to the named consignee, though in the case of a bill of lading so made out, that is, to the consignee or order, if the master does deliver the goods without its production he runs the risk of the bill having been indorsed by the consignee. Art. 653 of the Code (1) deals with the contract between shipowner and

of the shipper concerning the returning or delivery of such goods, unless all copies of such bill of lading are returned to him. The same rule applies to any demand made by any holder of a bill of lading for delivery of goods previous to the arrival of the master at the port of destination.

"Should he act in contravention of these provisions, he remains liable to any legal holder of the bill of lading.

"In case the bill of lading has not been issued to order, the master shall return or deliver such goods, even without the production of a copy of the bill of lading, if the shipper and the consignee named in such bill of lading have expressed their proper consent to the returning or the delivery of such goods. When, however, all the copies of the bill of lading are not returned, the master can previously demand security for any losses which might arise in consequence thereof."

(1) Art. 653: "The bill of lading is decisive of the legal position of the shipowner and the consignee of the goods towards each other, more especially the delivery of the goods to the consignee shall take place in accordance with the contents of the bill of lading. . . . ."

1889

THE STETTIN.

consignee. Arts. 647 and 661 of the Code enable the master, for his own protection, to call for the production of the bill of lading, but do not oblige him to do so. If the bill of lading is made to the shipper's order, then its production is required because, until produced by the holder, the master does not know to whom to deliver the goods.

Cohen, Q.C., and *Pyke*, for the plaintiffs. The defendants are liable. Mendelsohn was the agent of Manasse, and the bill of lading, together with the goods it represented, were at the time of delivery the property of the plaintiffs. It was a breach of the agreement between the plaintiffs and the defendants as to the carriage of the goods under the bill of lading to deliver them to Mendelsohn without production of the bill of lading. This is the rule of the English law, by which the case is governed, but as the defendants rely on German law, the plaintiffs further contend that the same rule prevails in that law.

Barnes, Q.C., and *Joseph Walton*, for the defendants. The terms of the bill of lading are that the goods shall be delivered at Stettin to Mendelsohn or to his assigns. The defendants duly delivered the goods to Mendelsohn, and thereby discharged their obligation towards the plaintiffs. It is true that by so delivering the goods to Mendelsohn the defendants ran the risk of the bill of lading having been assigned by him, but it is admitted that the bill never was indorsed, so that no question arises as to the assignees of Mendelsohn. The master in delivering as he did followed the usual custom at Stettin, and the ship being a German vessel, the contract is governed by German law. The delivery of the goods was in accordance with German law and English law is the same.

[BUTT, J. According to the terms of this bill of lading, if one of the bills is accomplished, the other is to stand void, which of the two parts of the bill do you say was accomplished?]

That clause in the bill of lading is inserted for the protection of the shipowner, to prevent his being liable on both parts.

The goods arrived in Stettin on June 25, but the bill of lading would not reach Stettin viâ Breslau until later. It was never intended that the goods should be detained by the shipowner in

Stettin until the production of the bill of lading, though it may have been the intention of the plaintiffs that Mendelsohn, as their agent, should not forward the goods to Breslau until the bill of lading was produced to him by Manasse, but that would not affect the position of the shipowner towards the shipper.

BUTT, J. I have no doubt on the evidence that Mendelsohn was the agent of Manasse and not of the shipper of the goods. This disposes of one contention raised by the defendants, but the main point is that by German law a shipowner is entitled to deliver goods to the consignee named in the bill of lading without the production of either of its parts.

German advocates have been called on both sides, but, as they differ, I must, in this divergence of opinion, decide what, in the result, the German law appears to me to be.

Having considered the reasons given by these advocates for their opinions, I have come to the conclusion that, on this point, German law does not essentially differ from English law.

According to English law and the English mode of conducting business, a shipowner is not entitled to deliver goods to the consignee without the production of the bill of lading. I hold that the shipowner must take the consequences of having delivered these goods to the consignee without the production of either of the two parts of which the bill of lading consisted. There will be judgment for the plaintiffs with, if necessary, a reference to the registrar to ascertain the amount of damage.

Judgment for plaintiffs.

Solicitors for plaintiffs: *J. A. & H. E. Farnfield.*
Solicitors for defendants: *Cooper & Co.*

E. S. R.

1889
July 23, 24.

[IN THE COURT OF THE ARCHBISHOP OF CANTERBURY. (1)]

READ *v.* BISHOP OF LINCOLN.

Ecclesiastical Law—Bishop—Rubrics—Acts of Uniformity (1 *Eliz. c.* 2, *and* 13 *&* 14 *Car.* 2, *c.* 4).

The word "minister," in the rubrics relating to the administration of the Holy Communion, must be taken to include a bishop, and a bishop officiating as minister in the service of the Holy Communion is bound to celebrate it in the order and form prescribed by the Book of Common Prayer.

Objections to articles: The Bishop of Lincoln was charged by the articles in this suit with having, when officiating as bishop and principal celebrant at a service of the Holy Communion, and being bound to celebrate it in the order and form mentioned in the Book of Common Prayer, failed to do so, whereby he had offended against the ecclesiastical law of England. The articles were substantially the same as the citation in the suit, and the present objection was substantially the same as that raised by the fourth objection of the protest to the jurisdiction, which was not argued when the principal objection was argued. (2) The first objection to the admission of the articles was also the same as that already decided (2); the second objection was in the following terms: "The matters charged, seeing that they are charged as being done by the defendant as bishop, are not offences against the laws, canons, and constitutions of this Church and Realm, and of the Province of Canterbury."

A preliminary application to amend the articles was made by counsel for the promoters, and this having been refused, the objection was argued.

Sir *W. Phillimore*, and *A. B. Kempe*, (*Jeune, Q.C.*, with them), for the Bishop of Lincoln. The articles do not disclose any legal ground for proceeding against the defendant; a bishop is not within the scope of the rubrics, and does not offend against eccle-

(1) The Vicar-General of the Province of Canterbury (Sir J. P. Deane) sat with the Archbishop, and also the Bishops of London, Hereford, Rochester, Oxford, and Salisbury, as assessors.

(2) Reported ante, p. 88.

siastical law by neglecting to follow them, unless the ritual he employs connotes heretical doctrines, or is offensive or unseemly, or is contrary to the directions given for some particular services in which a bishop is specifically mentioned, such as consecration and ordination services, and other purely episcopal functions. The fact that there exists no case of a bishop ever having been tried for deviation from ritual shews that a bishop was left to his own discretion, looking generally to the Prayer Book as a guide: Bingham, Antiquities of the Christian Church (1); Hook, Lives of Archbishops of Canterbury. (2) In former ages of the Church the bishop of a diocese could alter the missals as he pleased: *Kemp* v. *Wickes*. (3)

If a bishop is within the Acts of Uniformity then various modern services at which he officiates, services for the opening of churches, admission of deaconesses and others, are illegal. If the term "minister" in the ornaments rubric in the first Prayer Book of Edward VI. (1549) is taken to include bishop, then, as the Act of Uniformity of Elizabeth revived that rubric, bishops should wear the vestment prescribed by that rubric, which they do not; again, if the term "minister" in the Advertisements, (Cardwell's Documentary Annals, vol. i. p. 326) includes a bishop, then he ought only to wear a surplice, for the Privy Council have pronounced surplices to be obligatory: *Ridsdale* v. *Clifton*. (4) It is clear that the word "minister" in the rubric to the communion service does not include bishop, nor does it in the Canons of James I. [They referred to canons 14, 26, 27, 33, 36, 38, 39, 55, 58, 62, 63, 65, 68.] It is also contended that the words "all and singular ministers," and "any manner of parson, vicar, or other whatsoever minister" in the Act of Uniformity of Elizabeth (1 Eliz. ch. 2, ss. 3, 4) do not include bishop: *Archbishop of Canterbury's Case* (5), *Copland* v. *Powell* (6), *Cope* v. *Barber*. (7) Very similar words in the Act of Uniformity of Charles II. (13 & 14 Car. 2, c. 4), ss. 2, 3, 6, 24, do not include a bishop.

Sir *H. Davey, Q.C.*, and *Tristram, Q.C.* (*Danckwerts*, with them), for the promoters. The word "minister" in the rubrics must be

(1) Bk. II., ch. vi., s. 1.
(2) Vol. vii., p. 299.
(3) 3 Phill. 264 (268).
(4) 2 P. D. 276.
(5) Coke's Rep., Pt. II. 555.
(6) 1 Bing. 369.
(7) Law Rep. 7 C. P. 393 (403).

1889

READ v. BISHOP OF LINCOLN.

taken to include a bishop, it is a general word applicable to any persons who minister in a service of the Church; in the second Prayer Book of Edward VI. it is stated that there have been three "orders of ministers in Christ's Church, bishops, priests, and deacons." [They referred to the prefaces to the several Prayer Books, the present Service for the Consecrating of Bishops, to canons 24 and 55 of 1603, and to Shipley's Glossary of Ecclesiastical Terms—Minister.] It was contemplated that the Acts of Uniformity should apply to every one in the Church, and it is contended that the words of the Act, both of Elizabeth and of Charles II., include bishops; the Prayer Book of Charles II. is annexed to the Act of that reign.

Sir *W. Phillimore,* in reply.

THE ARCHBISHOP OF CANTERBURY. We have before us the objections raised by counsel for the Bishop of Lincoln to the admission of the articles in this suit. The first objection was not pressed; as regards the second, the Court is of opinion that when a bishop ministers in any office prescribed by the Prayer Book he is a minister bound to observe the directions given to the minister in the rubrics of such office.

THE BISHOP OF SALISBURY dissented.

Objection overruled.

Proctors for promoters: *Wainwright & Baillie.*
Proctors for Bishop of Lincoln: *Brooks, Jenkins, & Co.*

E. S. R.

IN THE GOODS OF MINSHULL.

1889
June 25.

Administration—Agreement between Parties interested in the Estate—"Special Circumstances"—20 & 21 Vict. c. 77, s. 73.

Doubts having arisen as to the legitimacy of the person claiming to be next of kin, it was agreed between the persons interested in the estate of the intestate that such claimant should apply for a grant of administration under 20 & 21 Vict. c. 77, s. 73, and that the estate should afterwards be divided between them and the claimant:—

Held, that there were "special circumstances" to warrant the Court in making a grant to the person applying in pursuance of the agreement.

APPLICATION for a grant of administration under the 73rd section of the Probate Act (20 & 21 Vict. c. 77).

Harriet Minshull, deceased, died November 20, 1883, in Marylebone Workhouse, in the county of Middlesex, intestate. Under the will of an uncle, Samuel Minshull, she was entitled in reversion to a legacy of 200*l.*, which did not become payable until the month of March, 1888. She was next of kin, and the sole person entitled in distribution of the estate of her sister, Elizabeth Grindley, who was also a legatee to the same amount under the will of Samuel Minshull, and who had died intestate.

The applicant for administration, Mary Frances Hall, claimed to be the grand-niece of Harriet Minshull and Elizabeth Grindley, being the grand-daughter of their sister Mary Finden, who was alleged to have been married to Frank Finden. Some doubt had been raised as to whether any such marriage had taken place, and therefore whether the applicant's father was legitimate. The trustees under Samuel Minshull's will accordingly paid both legacies into the Chancery Division under the Trustees Relief Act.

In the event of the applicant's father being illegitimate, the person who would be entitled to both legacies was Harriet Louisa Minshull Demarest, residing in Paris, and she and Mrs. Hall had come to an agreement that Mrs. Hall should take out a grant of administration, and that they should divide the estate between them.

Searle, moved for a grant of administration to Mrs. Hall under

1889

IN THE GOODS OF MINSHULL.

the 73rd section of the Probate Act (20 & 21 Vict. c. 77), and cited *In the Goods of Hopkins.* (1)

Middleton, for Mrs. Desmaret, consented.

BUTT, J. I think the special circumstances of the case are such as to justify the application, and I make the grant accordingly.

Solicitors for applicant: *E. W. & R. Oliver.*

Solicitors for parties: *Gush, Phillips, & Co.*

W. L.

July 2.

IN THE GOODS OF FAWCETT.

Administration — Suit pending touching the Validity of Will of Executor — Grant of Administration pendente Lite to the Estate of Testator as to which there was no Litigation—20 & 21 Vict. c. 77, s. 70.

A husband died leaving a will of which his wife was sole executrix at the time of his death. The executrix took out probate and died leaving a will the validity of which was disputed in a suit which was pending in the court. A representative of the husband being required to receive money due to his estate, the Court appointed an administrator pendente lite to the estate of the husband.

In the Goods of Dawes (Law Rep. 2 P. & D. 147) doubted but followed.

APPLICATION to the Court to appoint an administrator pendente lite of the estate of R. Fawcett.

It appeared that R. Fawcett died February 8, 1887, leaving a will duly executed, of which he appointed his wife, Phœbe Fawcett, and his brother, John Fawcett, executors. John Fawcett died in the testator's lifetime, and Phœbe Fawcett took out probate, and died November 13, 1888, leaving a part of the estate unadministered.

Phœbe Fawcett left a will, the validity of which was disputed in an action now pending in this court (*Illingworth* v. *Butterfield*), the plaintiff being Phœbe Fawcett's executor, and the defendant her nephew and one of her next of kin.

A representative of the estate of R. Fawcett was required to receive a sum of £8000 due in respect of the sale of land, part of his estate.

(1) Law Rep. 3 P. & D. 235.

1889

IN THE GOODS OF FAWCETT.

Middleton, on behalf of the defendant Butterfield, with the consent of the residuary legatees under the will of R. Fawcett, moved for a grant pendente lite to his unadministered estate, and cited *In the Goods of Maria Dawes* (1), where litigation having arisen as to the will of a widow, who was the sole executrix and legatee under the will of her deceased husband, the Court granted administration pendente lite to the estate of her husband, and similar administration to the estate of the widow. [He also cited (from the notes of Mr. Registrar Jenner) the case of *Sheppard* v. *Carter*, the circumstances of which he contended were identical with the present case. The will of Ann Sheppard was disputed, who had proved the will of her husband as sole executrix, and the Court made a grant pendente lite to the estate of the husband.]

[BUTT, J. It seems to be contrary to the provision in 20 & 21 Vict. c. 77, s. 70; would the 73rd section help you?]

Searle, for Mr. Illingworth, the executor of the will of Phœbe Fawcett. The case of *Sheppard* v. *Carter* seems to have been decided on the authority of *In the Goods of Dawes* (1), and in that case the grant was made by consent—at least it was not opposed. The Court has no power to make such a grant under s. 70. The words of that section are: "pending any suit touching the validity of the will of any deceased person, the Court may appoint an administrator of the estate of any such deceased person." Here the deceased person in respect of whose estate a grant is asked is Richard Fawcett, and there is no lis pendens touching the validity of his will. The will which is in dispute is the will of the widow. The 73rd section does not apply, for there is not only an executor resident in the country competent and willing to take the grant, but a grant of probate has been actually made.

Middleton, in reply. The executor who opposes this grant has really no interest in the matter. The only persons interested are the residuary legatees of Richard Fawcett.

BUTT, J. I am not altogether satisfied that when *In the Goods of Dawes* (1) was decided the attention of the Court was sufficiently drawn to the words of the 70th section, but I shall follow the

(1) Law Rep. 2 P. & D. 147.

1889

IN THE GOODS OF FAWCETT.

precedent, though with doubt. I make a grant of administration pendente lite with the will annexed to the estate of Richard Fawcett, and refer it to the registrar to settle to whom it shall go.

Solicitors for applicant: *Sinclair & Holmes.*
Solicitors for Mr. Illingworth: *Wynne, Baxter, & Keeble.*

W. L.

June 18, 19.

WHEELER *v.* WHEELER AND RHODES.

*Divorce—Wife's Petition—Husband's Answer alleging Adultery—Permission to alleged Adulterer to intervene—*20 *&* 21 *Vict. c.* 85, *s.* 28—29 *&* 30 *Vict. c.* 32, *s.* 2.

Where in a wife's suit for dissolution of marriage the husband in his answer charged his wife with having committed adultery with a specified person, but did not pray for a dissolution of the marriage, the Court allowed the alleged adulterer to intervene and file an answer.

LUCY ELIZABETH WHEELER, the petitioner in this case, prayed for a dissolution of her marriage with Alfred Llewelyn Wheeler on the ground of his adultery and cruelty. The respondent in his answer denied the charges, and subsequently obtained leave to amend his answer by adding a paragraph charging his wife with having committed adultery with Herbert Rhodes at Henley, Goring, and other places, but he did not pray for a dissolution. The petitioner denied the charge, and on June 4 Rhodes obtained an order in chambers permitting him to intervene and file an answer to the charge.

R. H. Pritchard, on behalf of the respondent, moved to discharge the order. The Court has no jurisdiction to make such an order. The respondent in his answer does not make a counter-claim for a dissolution of his marriage, therefore s. 2 of the 29 & 30 Vict. c. 32, does not apply.

[BUTT, J. Do you say that under that section I could not grant a divorce to the respondent in a case like the present?]

Certainly not. It amends the Divorce Act (20 & 21 Vict. c. 85) in regard to procedure only, and s. 28 of the Divorce Act, which requires that the adulterer shall be made a co-respondent when the petition is presented by the husband, but which does

not require that to be done when the husband counter-charges adultery, still applies.

[BUTT, J. It is the practice when a husband in his answer charges his wife with adultery, to require him to make the alleged adulterer a party.]

That is only where the husband by his counter-claim prays for a dissolution, and not where, as here, he only relies upon his wife's adultery as a bar to her claim. Sect. 2 of the 29 & 30 Vict. c. 32, on which the intervener will rely, does not apply, because the only relief the respondent asks for is that his wife's petition may be dismissed.

Crosse, for the intervener. Sect. 2 shews clearly that the Court may give any respondent who alleges adultery the same relief as if he or she had been the petitioner. The respondent will not incur any inconvenience from the order objected to, and unless it stands the intervener may be made a party, and condemned in costs without any opportunity of being heard in his own defence. In the case of a collusive suit it would be the height of injustice to refuse an accused person the power of defending himself. The object of s. 2 of 29 & 30 Vict. c. 32, is that all the facts may be before the Court, and if the respondent establishes his case he will be entitled to a decree though he may not have prayed for it.

R. H. Pritchard, in reply. The object of the Act in requiring a party to be cited is not his interest, it proceeds upon grounds of public policy, to prevent a divorce being obtained by collusion. But here a divorce is not claimed, and all the relief sought is that the petition shall be dismissed, consequently there is no reason why the alleged adulterer should be allowed to intervene.

C. A. Middleton, for the petitioner, supported the order.

Cur. adv. vult.

BUTT, J. This was a motion made by the respondent yesterday to set aside an order which I had made in chambers allowing one Herbert Rhodes to intervene in the suit. The petition is by the wife, claiming dissolution of her marriage with the respondent on the ground of his cruelty and adultery. An answer was put in by the respondent denying the charge, and he subsequently obtained leave to add a counter-charge of adultery against the

1859

WHEELER v. WHEELER AND RHODES.

Butt, J.

petitioner with Herbert Rhodes. That amendment having been made, Rhodes applied for leave to intervene, and I made an order in chambers giving him leave. The question on this motion is whether the order was rightly made. Herbert Rhodes being charged with adultery with this woman, it would seem reasonable and proper that if he chose he should have the right to appear in Court to negative the charge at the hearing. It is a reasonable thing, as far as Rhodes is concerned—and there are other reasons for complying with his request. It is desirable as a matter of public policy that the Court should be possessed of all information on one side and the other before it proceeds to dissolve the marriage. The policy of the Divorce Act, as well as the reasonableness of the thing in regard to Mr. Rhodes' interest, should dispose the Court to allow his intervention. The respondent, having made this charge, objects, somewhat unreasonably as it seems to me, to the man against whom he has made it being heard. His counsel argued that there is no power or jurisdiction in the Court to allow such an intervention, and he relies on the 28th section of 20 & 21 Vict. c. 85, and also on the 2nd section of the 29 & 30 Vict. c. 32. Under that section where the respondent, the husband, has in answer to his wife's petition for a dissolution of marriage made a counter-charge of adultery against her, and prays for a dissolution of his marriage on the ground of the adultery, it is the clearly established practice of the Court to require him to state who the person is who is charged with committing adultery with his wife, and to make him a party to the suit; but it is said in the present case that there is no power to allow an intervention, because the husband has not claimed in his answer a dissolution of his marriage with the petitioner on the ground of her adultery. It is said, further, that he is entitled to set that up and to rely upon it solely as a defence to her action, without making the alleged adulterer a party to the suit. I doubt whether that is a sound contention, even when it is manifest on the pleadings that there is no counter-claim. It is not necessary that I should decide that now, because when I come to look at the pleadings I find there is an allegation of adultery, then there is the prayer "that the Court may be pleased to reject the prayer of the said petitioner

and to give the respondent such further and other relief in the premises as to the Court may seem fit." It is true that in words it does not pray for a dissolution of marriage; but taking the prayer as it stands, in conjunction with the 2nd section of 29 Vict. c. 32, that is its meaning. That section says that "in any suit instituted for dissolution of marriage, if the respondent shall oppose the relief sought on the ground, in case of such a suit instituted by a husband, of his adultery, cruelty, or desertion, or, in case of such suit instituted by a wife, on the ground of her adultery or cruelty, the Court may in such suit give to the respondent, on his or her application" (that must be at the hearing) "the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief." Under the petition as it stands, and according to the words of the 2nd section, it appears to me that the respondent at the hearing may apply for a dissolution, and that the Court would be empowered and possibly bound to grant the application. Under these circumstances I think Mr. Rhodes entitled to intervene. The order therefore in my opinion was rightly made, and I dismiss the appeal.

Solicitor for petitioner: *T. D. Dutton.*
Solicitors for respondent: *Blunt & Lawford.*
Solicitors for interveners: *Crosse & Son.*

W. L.

WOOD *v.* WOOD AND WHITE.

July 2.

Divorce—Husband's Suit—Order to deliver up Property to the Wife—Jurisdiction of Registrar—Married Women's Property Act, 1882 (45 & 46 *Vict.* c. 75), s. 17.

In a husband's suit for dissolution the registrar made an order directing the husband to deliver up to the wife certain articles, which she claimed as her property:—

Held, that the registrar had no jurisdiction to make such an order, and that it must be discharged, and the registrar directed to inquire and report as to the property in the articles in question.

THIS was a suit by the husband for dissolution of the marriage on the ground of his wife's adultery. The respondent had taken out a summons calling on the petitioner to hand over to her or

1889

WOOD v. WOOD AND WHITE.

to her solicitor certain articles set out in a list annexed to the summons, and on June 13 the registrar made an order to that effect.

B. Deane, moved to discharge the order. By s. 17 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), such an order can only be made by the Court or Judge. Moreover, the husband denies that these articles are his wife's property. They are merely wedding presents, and are the joint property of husband and wife.

C. A. Middleton, for the respondent.

BUTT, J. This is an order which a registrar had no power to make under the Married Women's Property Act, and I therefore discharge the order which has been made. I direct that the matter be referred to the registrar to inquire into the property in those articles, and report to me.

Solicitors for petitioner: *Lewis & Lewis.*
Solicitors for respondent: *Chester & Co.*

W. L.

July 9.

GILLET *v.* GILLET.

Divorce—Husband convicted of aggravated Assault—Order by Magistrate that Wife be not bound to cohabit—Payment of Weekly Allowance—Order to secure the Wife's Costs of Suit—Husband entitled to Legacy—Injunction—41 Vict. c. 19, s. 4.

In a petition by the wife for dissolution of the marriage it appeared that before the petition, the husband having been convicted of an aggravated assault on his wife, a magistrate made an order under 41 Vict. c. 19, s. 4, that the wife be not bound to cohabit with her husband, and that he should pay to her the sum of 1*l.* weekly. In the suit in this court orders had been made on the respondent to pay 16*l.* and secure a further sum of 45*l.* to defray the wife's costs. The husband was entitled to the sum of 1400*l.* under the will of a deceased testatrix, and the wife had obtained an ex parte injunction restraining the husband from receiving any part of the legacy.

On an application for the continuation of the injunction and the appointment of a receiver, the Court continued the injunction in regard to the costs until the trial or payment of them, but declined to make any order for the enforcement of the magistrate's order for an allowance.

THIS was a petition by the wife for a dissolution of her marriage on the ground of adultery coupled with cruelty.

1889

GILLET v. GILLET.

On October 5, 1888, Mr. Chance, one of the metropolitan police magistrates, sitting at Lambeth, convicted the husband of an aggravated assault, and made an order under s. 4 of the 41 Vict. c. 19, that the petitioner should not be bound to cohabit with her husband, and that he should pay her an allowance of 1*l.* weekly.

On October 5, 1888, the petitioner filed a petition, praying for a dissolution of the marriage on the ground of adultery, committed subsequent to the order, coupled with the cruelty on which the order had been granted, and in this suit the husband had been ordered to pay a sum of 16*l.* into court—being the amount of the wife's taxed costs up to that date—and on July 5 he was further ordered to pay into court or to give security for 45*l.*, the estimated amount of the wife's costs for the hearing. He had not complied with either of these orders, and he was also in arrear with the allowance ordered by the magistrate.

The respondent was entitled to the sum of 1400*l.* under the will of Sarah Oakes deceased, and on July 2 the petitioner had obtained ex parte an interim injunction restraining the respondent from receiving any part of this sum.

Walter, on behalf of the petitioner, moved that this injunction be continued until the trial, and that a receiver be appointed to receive the sum due to the respondent under the will. The magistrate's order under s. 4 has the force and validity of a decree of judicial separation, but the magistrate has no power to grant an injunction; the petitioner is therefore compelled to come to this court for a remedy.

[BUTT, J. Sect. 4 merely means that an order is to have the same effect in regard to protecting the wife from being compelled to cohabit with her husband, it does not refer to the enforcement of alimony.]

He cited *Oliver* v. *Lowther* (1) and *Sidney* v. *Sidney*. (2)

Searle, for the respondent. The injunction may be granted as to the sums due for costs, but it is not competent for the Court to enforce the magistrate's order in the manner proposed. The material words of s. 4 in this regard are in sub-s. 1, "and

(1) 28 W. R. 381. (2) 17 L. T. (N.S.) 9.

1889

GILLET v. GILLET.

payment of any sum of money so ordered shall be enforceable and enforced against the husband in the same manner as the payment of money is enforced under an order of affiliation."

BUTT, J. I think this injunction was properly granted as to the sums of 16*l.* and 45*l.* ordered to be paid for the wife's costs, but I do not think I have anything to do with the claim under the magistrate's order, and after hearing the circumstances of the case I do not think the injunction should have been granted in regard to the allowance. The injunction will be extended to the hearing, but limited to the costs, and with liberty of course to apply again as soon as the respondent has paid the costs.

Solicitors for the petitioner: *Maynard & Son.*
Solicitors for the respondent: *Alfred Hicks & Arnold.*

W L.

July 23.

BUTLER *v.* BUTLER.
BUTLER *v.* BUTLER AND BURNHAM.

Divorce—Cross Petitions by Husband and Wife—Decree Nisi on Wife's Petition —Intervention by Queen's Proctor — Wife's Costs—Rule 201 *of Divorce Rules.*

In cross-petitions by the husband and wife for dissolution of the marriage a decree nisi was pronounced on the wife's petition, and the husband was condemned in costs. Subsequently the Queen's Proctor intervened, and charged the wife with adultery, collusion, and suppression of material facts. The husband, in compliance with an order of the registrar, had paid money into court to meet the wife's costs in both suits:—

Held, that the wife was not entitled to have the money in court paid out until the decree nisi had been made absolute.

THESE were cross-petitions by the husband and wife for dissolution of the marriage. A decree nisi had been pronounced at the suit of the wife, and the husband had been condemned in costs. Subsequently the Queen's Proctor intervened, alleging adultery, collusion, and the suppression of material facts.

In the course of the proceedings the husband had paid into court on the order of the registrar the sum of 90*l.* to secure the wife's costs of the hearing of both suits.

1889

BUTLER v. BUTLER.

BUTLER v. BUTLER AND BURNHAM.

B. Deane moved that this sum of 90*l.* be paid out of court to the wife or to her solicitor, and cited *Gladstone* v. *Gladstone.* (1)

[BUTT, J. What do you say to rule 201 ? It directs that where a respondent or co-respondent has been condemned in costs "they shall not be paid out of the registry to the party entitled to receive them under the decree nisi until the decree is made absolute."]

There is a distinction to be drawn between the full costs given when the decree nisi is pronounced and the costs paid into court at the hearing. Otherwise the rule would prevent a wife who had been successful obtaining the costs of the hearing, while an unsuccessful wife would get them at once.

C. A. Middleton, for the husband. The intention of the rule is that if a husband or wife is successful in the suit he or she shall obtain an order on the respondent or co-respondent for the costs. But the costs are paid into court, and no order can be made for their payment to the petitioner until the decree nisi is made absolute. That is in order to retain the power of reviewing the conduct of the petitioner or the solicitor in the cause. But if the wife is unsuccessful and her suit is dismissed the Court decides there and then under rule 159 whether she ought to have any and what costs, and there is an end of the matter.

BUTT, J. I do not see that the rule is altogether a rational provision, but there it is, and I must direct that the whole question of costs is to abide the event—whether the decree is made absolute or not.

Solicitors for the husband: *Goldring, Mitchell, & Co.*

Solicitors for the wife: *Clinton & Buckley.*

(1) Law Rep. 3 P. & D. 260.

W. L.

1889
Aug. 5.

DAVIS *v.* DAVIS.

Judicial Separation—Order for Custody of Children—Death of Parent obtaining Order—Application by Third Person for Custody—22 & 23 Vict. c. 61, s. 4.

By 22 & 23 Vict. c. 61, s. 4, the Court after a final decree of judicial separation, &c., may, upon application for this purpose, make from time to time orders with respect to the custody of the children the marriage of whose parents was the subject of the decree, as might have been made by final decree:—

Held, that upon the death of the parent of a child who was entitled to the custody of it under a decree for judicial separation, the Court had no jurisdiction under s. 4 to entertain an application by a stranger for the custody of the child.

PETITION by the mother of a deceased petitioner to continue to her the custody of a child which had been given to her daughter by order of the Court.

A decree of judicial separation was pronounced on July 14, 1886, in a petition by the wife, on the ground of her husband's cruelty and adultery, and the custody of Charles W. Davis, the only child of the marriage, was given to the petitioner, and the respondent was ordered to pay 96*l.* a year as permanent alimony, and 20*l.* a year for the maintenance of the child. The petitioner died August 16, 1888.

B. Deane, applied for an order that the child might be allowed to remain in the custody of the mother of the petitioner with whom it had lived, together with the petitioner, ever since the final decree, and also that the respondent might be ordered to continue to pay to the grandmother the allowance of 20*l.* a year.

Middleton, contrà. The order applied for cannot be made on the application of a third person after the death of one of the parties to a suit for judicial separation. When one of the parents to whom the custody of a child has been given by the Court dies, there is an end of the suit. The grandmother could not intervene without the leave of the Court.

[BUTT, J. Supposing there had been a declaration under the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), that the husband was unfit to have the custody of the child, how could this question be raised?]

The only application which could be made would be in Chancery; but no such declaration was made at the time of pronouncing the decree in this case.

B. Deane, in reply. Sect. 4 of 22 & 23 Vict. c. 61, gives the Court power to make from time to time after final decree all such orders with respect to the custody, maintenance, and education of the children of the marriage as might have been made in case the proceedings for obtaining such decree were pending. In *Ling* v. *Ling* (1) the Court entertained an application for variation of settlements for the benefit of the children after the death of one of the parties, and in *Chetwynd* v. *Chetwynd* (2) a third party was allowed to intervene for the purpose of obtaining the custody of the children.

BUTT, J. My view of s. 4 is that it refers only to an application to be made by one of the parents, and that it does not contemplate an application being made by a stranger. This motion must, therefore, be rejected.

Application dismissed.

Solicitors for applicant: *Prior, Church, & Adams.*
Solicitors for respondent: *G. & W. Webb.*

(1) 4 Sw. & Tr. 99. (2) Law Rep. 1 P. & D. 39.

W. L.

1889

May 31; June 1.

THE TWEEDSDALE.

Collision—Steam Trawler—Regulations for Preventing Collisions at Sea, Arts. 10, 17, 23.

The plaintiffs' steam trawler, above twenty tons register, while fishing with her trawl down in the night and going at the rate of one and a half knots an hour, came into collision with the defendants' sailing ship. The trawler was carrying a lantern in front of her foremast head, shewing a white, green, and red light, and about six or seven feet below it a white light, according to the provisions of art. 10 for Preventing Collisions at Sea, as amended by an Order in Council of December 30, 1884. The trawler did not attempt to get out of the way of the sailing ship, so as to comply with art. 17, by which a steamship is to keep out of the way of a sailing ship:—

Held, that the trawler was not to blame for the collision; that art. 17 did not apply, inasmuch as there were "special circumstances" within the meaning of art. 23 which authorized a departure from art. 17, that by carrying the lights which she did, she apprised other vessels that she was not able to get out of the way, for such lights as she carried were the regular lights of steam vessels engaged in trawling which are not bound by the requirements of art. 17.

ACTION of damage by collision. The plaintiffs were the owners of the steam trawler *City of Gloucester*, of over twenty tons register, and the defendants were the owners of the barque *Tweedsdale*. The collision, the subject of the action, occurred about 1.30 A.M. on June 5, 1888, about fifteen miles W.N.W. of Lundy Island. Shortly before the collision the *City of Gloucester* was trawling, and going at about one knot an hour. She was carrying a lantern in front of the foremast head, shewing a white, green, and red light, and about six or seven feet below it a white light. The *City of Gloucester* carried this light in accordance with art. 10 of the Regulations for Preventing Collisions at Sea, as altered by an Order in Council of December 30, 1884. (1)

(1) "Art. 10.

(*a.*) All fishing vessels and fishing boats of 20 tons net registered tonnage, or upwards, when under way and when not required by the following Regulations in this article to carry and show the lights therein named, shall carry and shew the same lights as other vessels under way.

"And whereas the Admiralty and the Board of Trade have, in pursuance of the Merchant Shipping Act Amendment Act, 1862, jointly recommended to Her Majesty that the Regulations contained in the Schedule to the said recited Order in Council of the eleventh day of August one thousand eight hundred and eighty-four shall as regards British fishing vessels and boats when in the sea off the coast of Europe lying north of Cape Finisterre

Various points were raised by the plaintiffs and defendants, but the question of law raised was whether a steam trawler was bound

be modified and added to in manner following, that is to say:

"That as regards steam vessels engaged in trawling, such vessels, if of 20 tons gross register tonnage or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction, should, if they do not carry the lights required by the said recited article 3 of the Regulations aforesaid, be permitted to carry and show in lieu thereof and in substitution therefor, but not in addition thereto, whilst so engaged in trawling, and having their trawls in the water, and not being stationary as aforesaid, other lights of the description set forth in Part I. of the Schedule hereto; and that when under way, and not having their trawls in the water, they should carry and shew the lights required by article 3 above recited:

"Now, therefore, Her Majesty, by virtue of the powers vested in Her by the said Act, and by and with the advice of Her Privy Council, is pleased to direct that on and after the first day of January, one thousand eight hundred and eighty-five, the Regulations contained in the Schedule to the said recited Order in Council of the eleventh day of August, one thousand eight hundred and eighty-four, shall as regards British fishing vessels and boats when in the sea off the Coast of Europe, lying north of Cape Finisterre, be modified and added to as follows, viz.,

"As regards steam vessels engaged in trawling when under steam, such vessels, if of 20 tons gross register tonnage or upwards, and having their trawls in the water, and not being stationary, in consequence of their gear getting fast to a rock or other obstruction, shall between sunset and sunrise either carry and show the lights required by the said recited article 3 of the Regulations aforesaid; or, shall carry and show in lieu thereof and in substitution therefor, but not in addition thereto, other lights of the description set forth in Part I. of the Schedule hereto:

"The red and green lights, which are by this Order permitted as aforesaid to be carried in lieu of the lights required by Articles 3 and 6 of the said recited Regulations respectively, shall be of such a character as to be visible at a distance of not less than two miles on a dark night, with a clear atmosphere.

"And Her Majesty is pleased further to direct that steam vessels of 20 tons gross register tonnage or upwards, and sailing vessels of 20 tons net register tonnage or upwards, engaged in trawling, when under way between sunset and sunrise, but not having their trawls in the water, shall, if steamships, carry and show the lights required by article 3 above recited, and if sailing ships, shall carry and show the lights required by article 6 above recited. Provided, however, that the modifications and additions set forth in Parts I. II. of the Schedule hereto shall not be applicable to the fishing vessels and boats of any Foreign Country unless and until the same shall have been made applicable thereto by Order in Council.

"C. L. PEEL."

"SCHEDULE.

"PART I.—*Steam Vessels.*

"(1.) On or in front of the foremast

1889

THE TWEEDSDALE.

by art. 17 (1) of the Regulations for Preventing Collisions at Sea, and therefore bound to keep out of the way of the *Tweedsdale*. The further facts of the case are fully set out in the judgment of Butt, J.

Barnes, Q.C., and *Robson*, for the plaintiffs. The *City of Gloucester* was not bound to get out of the way of the *Tweedsdale*; being a trawler at work it was impossible for her to do so, and therefore under art. 23 (2) she was relieved from the duty otherwise cast on her by art. 17. Secondly, she must be taken to have carried the regulation lights. Art. 10 gives a trawler an option as to what lights she shall carry, and by exercising that option by carrying the lights she did the *City of Gloucester* signified to other vessels that she was a trawler at work at a slow speed, and that they must get out of her way. A trawler not going at more than a knot and a half is practically a stationary vessel: *The Dunelm.* (3)

Sir W. Phillimore, and *Stokes*, for the defendants. It was the duty of the *City of Gloucester* to get out of the way of the *Tweeds-*

---

head and in the same position as the white light which other steam ships are required to carry a lanthorn showing a white light ahead, a green light on the starboard side, and a red light on the port side, such lanthorn shall be so constructed, fitted, and arranged as to show an uniform and unbroken white light over an arc of the horizon of four points of the compass, an uniform and unbroken green light over an arc of the horizon of ten points of the compass, and an uniform and unbroken red light over an arc of the horizon of ten points of the compass, and it shall be so fixed as to show the white light from right ahead to two points on the bow on each side of the ship, the green light from two points on the starboard bow to four points abaft the beam on the starboard side, and the red light from two points on the port bow to four points abaft the beam on the port side; and (2.) a white light in a globular lanthorn of not less than eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light all round the horizon, the lanthorn containing such white light shall be carried lower than the lanthorn shewing the green, white, and red lights as aforesaid, so, however, that the vertical distance between them shall not be less than 6 feet nor more than 12 feet." (Order in Council, December 30, 1884.)

(1) Art. 17. "If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship."

(2) Art. 23. "In obeying and construing these rules, due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

(3) 9 P. D. 164.

dale; she was a steamship "proceeding," and therefore bound to obey art. 17; she had headway, and could proceed in what direction she wished or have stopped, and so could get out of the way of another vessel. A tug with a vessel in tow is bound to obey art. 17, and a trawler is in an analogous position. The option as to lights given by art. 10 does not alter the duty cast on a trawler by art. 17, for she is a steamer within that article.

Barnes, Q.C., in reply.

Cur. adv. vult.

1889. June 1. BUTT, J. This is the case of a collision between the steam trawler *City of Gloucester* and the sailing vessel *Tweedsdale*. It occurred some fifteen or twenty miles from Lundy Island, on the early morning of June 5 last.

The *City of Gloucester* is a paddle steam trawler, and was at the time fishing with her trawl down. She was making, according to the evidence of her master, about one knot an hour; probably she may have been going from that to one and a half.

The *Tweedsdale* is a large sailing-vessel (I think her master called her a four-masted barque) of 1403 tons register, and at the time in question she was bound on a voyage from Cardiff to Valparaiso with a cargo of coals. There was a tolerably fresh breeze, it was a clear night, fine and dark. The *City of Gloucester* was heading somewhere about east and by south, and the *Tweedsdale* west-north-west making about seven knots an hour through the water.

The *Tweedsdale* was seen at a considerable distance, and as she approached the *City of Gloucester* those on board the latter vessel burnt several flares. Neither those flares nor the regulation lights of the *City of Gloucester* appear to have been seen by anybody on board that sailing vessel and the collision occurred, the officers and crew of the sailing vessel being in utter ignorance that there was any ship in their neighbourhood until they actually struck and sunk the steam-trawler.

There can be no sort of doubt but that that was most negligent navigation of this ship, and she must therefore be held to blame. Upon that part of the case neither the Elder Brethren nor myself have any difficulty whatever.

1889

THE TWEEDSDALE.

Butt, J.

But then arises a much more difficult question, and one which requires great care and consideration, and that question broadly stated is, Was the *City of Gloucester* also in fault?

She is, as I have said, a steam trawler; she had her trawl down, and she was being approached by this sailing vessel. It is said that she was to blame, first of all for not having stopped her engines. I do not know whether reversing is suggested; there would be a difficulty in the way of her reversing, having regard to the fact that her trawl was down. At all events it is said she committed a breach of art. 18 of the Regulations which provides that "Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or stop and reverse if necessary."

She was going, as I have said, at a very slow rate, and she did stop before the collision, and, I think, the proper and fair inference is that she did stop as soon as the danger became imminent, and that there is no blame attaching to her in respect of a breach of this regulation.

But now it is said, however that may be, she was within art. 17, and she failed to comply with it. The article is, "If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship." Mr. Barnes, who represents the owners of the *City of Gloucester*, says that that article did not apply to these circumstances for several reasons. In the first place, he says that these vessels really never were, till the last moment at all events, within art. 17, even regarding the trawler as an unencumbered vessel, because, he says, there is evidence to shew that when first seen, and for some time, the sailing vessel was manifestly going in such a direction that she would not have come into collision with the trawler had she kept her course, there was no risk of collision, and that therefore art. 17 does not apply.

If I were able to take that view of the facts of the case it would get rid of a great deal of difficulty with regard to the interpretation of rules to which I will refer by-and-by, and it would, moreover, I think, meet the substantial justice of the case. But I am not able to take that view, or to admit that to be a correct

1889

THE TWEEDSDALE.

Butt, J.

statement of the case. I think it clear from answers given to Sir Walter Phillimore by one or more of the witnesses from the *City of Gloucester* that for a very considerable time before this collision, and at a very considerable distance, the vessels were approaching one another so as to involve risk of collision, because they said that for something like ten or eleven minutes they actually had both lights of the sailing vessel open to them.

Therefore, if this steam trawler is to be treated as an unencumbered steamer, inasmuch as she did nothing to get out of the way of the approaching vessel, she must be held to blame for a breach of art. 17.

Then comes the further question. Such as she was, encumbered by her trawl, was she bound to obey the prescriptions of art. 17?

Now the evidence is, that having her trawl on the ground, she was moving at the rate of about one knot an hour, and that she was carrying the following lights:—a lantern in front of the foremast, shewing a white, green, and red light, and about six or seven feet below that a white light. The lantern with the red, green, and white lights was a composite lantern, so to speak, which is the lantern prescribed by one of the new regulations to which I will refer by-and-by; she was not carrying the ordinary lights for a steamer prescribed by art. 3 of the regulations. Those lights which this trawler had, assuming, as I think is the case, the *Tweedsdale* to have been approaching her in such a direction that she would only see the two white lights, ought to have apprised those on board the *Tweedsdale* that the other vessel was either a fisherman with her trawl down or attached to her nets, or with her lines out, for I find that in any one of those cases two white lights would be the signal.

In that state of things I think that art. 23 prevents the application of art. 17, and at once relieves the fisherman from the duty of keeping out of the way, and puts upon the other vessel the duty of keeping clear.

In arriving at this conclusion, although I do not think I can say that the decision of the Court of Appeal in the case of *The Dunelm* (1) is a direct authority upon the point, I have been greatly

(1) 9 P. D. 164.

1889

THE TWEEDSDALE.

Butt, J.

assisted by the observations of the learned judges who decided that case, and I think I am acting in entire accord with their view when I give the following effect to the present regulations applicable to vessels trawling, though they were not in force at the time the *Dunelm* was decided.

The present regulations applicable to trawlers are these: "As regards steam vessels engaged in trawling, when under steam such vessels, if of twenty tons gross register tonnage or upwards, and having their trawls in the water and not being stationary in consequence of their gear getting fast to a rock or other obstruction, shall between sunset and sunrise either carry and shew the lights required by the said recited art. 3 of the Regulations aforesaid, or shall carry and shew in lieu thereof and in substitution therefor, but not in addition thereto, other lights of the description set forth in Part 1 of the schedule hereto." Part 1 of the schedule hereto is as follows: "On or in front of the foremast head and in the same position as the white light which other steamships are required to carry, a lanthorn shewing a white light ahead, a green light on the starboard side, and a red light on the port side; such lanthorn shall be so constructed, fitted, and arranged as to shew an uniform and unbroken white light over an arc of the horizon of four points of the compass, an uniform and unbroken green light over an arc of the horizon of ten points of the compass, and an uniform and unbroken red light over an arc of the horizon of ten points of the compass, and it shall be so fixed as to shew the white light from right ahead to two points on the bow on each side of the ship, the green light from right ahead to two points on the bow on each side of the ship, the green light from two points on the starboard bow to four points abaft the beam on the starboard side, and the red light from two points on the port bow to four points abaft the beam on the port side: and (2) a white light in a globular lanthorn of not less than eight inches in diameter, and so constructed as to shew a clear, uniform, and unbroken light all round the horizon; the lanthorn containing such white light shall be carried lower than the lanthorn shewing the green, white, and red lights as aforesaid, so, however, that the vertical distance between them shall not be less than six feet nor more than twelve feet."

1889

THE TWEEDSDALE.

Butt J

I have already indicated that the *City of Gloucester* was carrying the lights prescribed by schedule No. 1.

It must be observed that the regulation gives a trawler an option: she may either carry the lights which this trawler was carrying at the time, or she may carry in lieu thereof the regulation lights prescribed by art. 3—that is, an ordinary steamer's lights.

I think the option so given must be exercised with discretion, and I think the discretion given must be used in this sense. If a trawler has not only sufficient way on her to keep herself in command, but also sufficient way to act with effect in altering her course for an approaching ship, then what I may call the ordinary regulation side-lights, that is the lights prescribed by art. 3, should be carried, and those in charge of her should act as the regulations require an unencumbered vessel to act. If the trawler has no more than just steerage way, and has little power, therefore, of keeping out of the way of another vessel, she should carry what I call the extraordinary regulation lights, namely the lights prescribed in the schedule I have just read, and the lights which this trawler was, in fact, carrying at the time of the collision. She should carry those lights and she should act as this vessel did. She should refrain from making any alteration of her course and leave the other vessel to keep clear of her.

The *City of Gloucester*, as I have said, was going at such a rate as to give her bare steerage-way, she was carrying the lights last mentioned, and I therefore hold her free from blame in this matter.

I have been obliged to put the best construction I can upon rules which are not easy of interpretation, and I am perfectly aware that it is almost impossible to put any construction that would not be open to some objection.

The one I have adopted leaves a serious responsibility upon persons in charge of trawlers, and probably upon their owners, because they have to make up their minds as to what speed will barely give steerage-way, and what will give something more; in other words, they must decide when their vessel ought to carry ordinary lights, under art. 3, and when she ought to carry the exceptional lights.

1889

THE TWEEDSDALE.

The conclusion to which I have come on the interpretation of the rules is happily one which accords with substantial justice in this case. I pronounce the *Tweedsdale* is alone to blame.

Solicitors for plaintiffs: *Ingledew, Ince, & Colt.*
Solicitors for defendants: *Stokes, Saunders, & Stokes.*

E. S. R.

July 8.

[IN THE COURT OF APPEAL.]

THE VINDOMORA.

Collision—Fog—Alteration of Helm.

The plaintiffs' vessel while proceeding in a dense fog heard the whistle of the defendants' vessel about 3½ points on her starboard bow, and thereupon starboarded her helm. A collision, however, occurred, as the defendants' vessel struck her on her starboard quarter:—

Held, that, under the circumstances, the plaintiffs' vessel was not to blame for starboarding her helm:

Held, also, that there is no general rule that a vessel when proceeding in a fog is not entitled to act with her helm, but that each case must depend upon the special circumstances.

APPEAL from a judgment of Butt, J., whereby he held the *Haswell* and the *Vindomora* each to blame for a collision between these two vessels about 7 P.M. on September 21, 1888, in the North Sea. The case of the *Haswell* was that at the time in question there was a dense fog, and that her engines were going dead slow, and that her course—being on a voyage from Sunderland to London—was S.E. by S. ½ S. Those on board the *Haswell* heard the whistle of a steamer about 3½ points on her starboard bow, and apparently from half a mile to a mile distant. Her engines were stopped and two short blasts of the whistle were blown: this signal was several times repeated. By art. 19 of the Regulations for Preventing Collisions at Sea this signal indicates that a vessel is directing her course to port. Butt, J., found that at the time the signals were made the *Haswell* was under a starboard helm. Shortly after these signals were given the *Vindomora* was seen and the *Haswell's* helm was put hard-a-starboard, and her engines full speed ahead. The *Vindomora*, however, struck her starboard quarter and sank her. Butt, J., held that the *Vin-*

1889

THE VINDOMORA.

domora was to blame, and he also held that the *Haswell* was to blame for starboarding her helm at a time when she could not have ascertained by the mere sound of the whistle the exact position of the other vessel. The plaintiffs, the owners of the *Haswell*, appealed.

Hall, Q.C. (*Pyke*, with him), for the plaintiffs. The *Vindomora* was alone to blame for the collision. The learned judge was wrong in holding that the *Haswell* was partly to blame, for, first, the *Haswell* did not in fact starboard until the *Vindomora* was seen; secondly, even if she did starboard at an earlier time she was justified in so doing; the vessels were crossing ships, and the *Haswell* having the *Vindomora* on her starboard side was justified in starboarding in order to keep out of the way of the other vessel, even though there was a fog at the time: *The Frankland and The Kestrel* (1); thirdly, such starboarding did not in any view of the case contribute to the collision.

[He was stopped.]

Sir *W. Phillimore*, and *J. P. Aspinall*, for the defendants. The *Haswell* was to blame: it was wrong to act in a fog with the helm at all; it is impossible in a fog for one ship to know with certainty the position of another by means of sounds, hence the ship which acts with her helm does so on speculation. This is established by several cases: *The Resolution* (2); *The Kirby Hall* (3); *The Dordogne*. (4)

LORD ESHER, M.R. Unless we are to hold that in all circumstances it is a rule of navigation that in a fog a vessel is not to alter her helm we cannot uphold the decision of the learned judge. I am of opinion that there is no such general rule, and in none of the cases which have been cited on behalf of the defendants can I find any such hard and fast rule laid down. Each case depends entirely on its particular circumstances—the position and distance of the vessels. [His Lordship then examined the evidence given by those on board of the *Vindomora*, and came to the conclusion it could not be relied on.] Then, was the *Haswell*

(1) Law Rep. 4 P. C. 529 (533).
(2) 60 L. T. p. 430.
(3) 8 P. D. 71.
(4) 10 P. D. 6.

1889

THE VINDOMORA.

Lord Esher, M.R.

wrong in starboarding after she heard the first whistle from the *Vindomora*? That depends on the position in which it was heard. It is said by all the witnesses from the *Haswell* that it was heard 3½ to 4 points on the starboard bow. It is impossible to say that it was exactly at this bearing, but it appears to me that it may be taken as a fact that this evidence is fairly correct, and it was practically accepted as correct by the defendants' counsel. Taking the bearing as 3½ points, our assessors advise us, in answer to my question, that there was nothing wrong in the *Haswell* starboarding under such circumstances. In answer to a further question, they answer that the starboarding did not in any way contribute to the collision. From these answers, and from my own view of the facts, I am of opinion—for I discard the evidence from the *Vindomora* altogether—that the starboarding by the *Haswell* was not a wrong manœuvre. I am, therefore, of opinion that this appeal must be allowed.

COTTON, L.J. I am of the same opinion. I will only add that I think the cases referred to by Sir Walter Phillimore do not establish the rule he contended for.

LINDLEY, L.J. I am of the same opinion.

Appeal allowed.

Solicitors for appellants: *Gellatly & Warton.*
Solicitors for respondents: *Botterell & Roche.*

E. S. R.

LISTER *v.* LISTER.

1889
July 23.

Divorce—Permanent Maintenance—Dum sola Clause.

A decree for dissolution of marriage was granted on the wife's petition, the husband having been guilty of adultery and aggravated cruelty. The Court in making an order for permanent maintenance directed that the husband should secure to the petitioner a sum equal to one-third of his ascertained income, and refused to confine the operation of the order to such period as the petitioner remained unmarried.

Semble, that where there is no such limitation upon the operation of the order the Court has a discretion to reduce the amount of the wife's allowance.

Quære, whether the Court has power to make an order for two allowances, one payable to the petitioner so long as she remains unmarried, and a different allowance to be payable to her in the event of her marriage.

THE petition was presented by the wife, praying for a dissolution of her marriage on the ground of her husband's adultery and cruelty, and a decree absolute was pronounced on February 12, 1889. The marriage took place in the year 1876, the petitioner being then only seventeen years of age. There was no issue of the marriage. On March 1 the petitioner presented a petition praying for a permanent maintenance, and on July 1 the registrar made a report directing that the respondent should secure to the petitioner the sum of 195*l.* per annum, being one-third of his annual income from securities and investments, "for her life or until she marries again."

Inderwick, Q.C. (*Searle*, with him), for the petitioner, moved to confirm the report, with the exception of the words of limitation, "until she marries again." There is nothing in the Acts of Parliament giving jurisdiction to the Court providing for any such limitation. The Court may make an order prescribing the amount of permanent maintenance for the term of the wife's natural life, even if she survives her husband.

Middleton, for the respondent. In the absence of some special reason to the contrary it has not been the practice to give from the husband's means a large allowance to the wife, which shall continue during a second marriage. Where any portion of the allowance is to continue after a second marriage, it is for the Court to consider whether the allowance should not be reduced.

1889

LISTER v. LISTER.

[BUTT, J. That must depend on the facts. If a man marries a young woman, and then commits adultery and treats her with abominable cruelty, it is only reasonable that some penalty should be inflicted on him. On the other hand, there may be cases in which the husband's conduct has not been so reprehensible, in which a different course may be pursued.]

If the wife is to be allowed to marry again, it is reasonable that the allowance should not be so large as if this limitation were inserted. Where permanent alimony is given which is not secured, the amount is usually one-third of the husband's income, but where the amount is ordered to be secured it is not the practice to give so large an amount.

Inderwick, Q.C., in reply. The practice has varied very much. In Divorce Bills provision was made for the wife without any restriction. When the matter came to be dealt with by Sir C. Cresswell, he thought that a wife should have a permanent maintenance at a rate much less than one-third of the husband's income, but Lord Penzance was of opinion that that was not a proper view to take. The President of this Division has held that a woman does not forfeit her allowance if she marries again. The point whether the allowance should be reduced when the petitioner marries again has never been entertained, except when there has been a question of variation of settlements.

BUTT, J. I do not think it would be reasonable to say in this case that because these words are eliminated therefore the wife should have a smaller allowance. I think the Court ought to have absolute discretion—otherwise why refer the matter to the Court at all?—but it is a discretion to be exercised according to the facts of each case. I doubt whether I have the power to make an order allotting two different incomes—one for the present time, and another if the petitioner marries again. Here, however, is the case of a man possessing himself of a mere girl and then behaving in such a manner as to force her to leave his home. I do not think I am called upon to put into the order for maintenance the limitation "until she marries again." I think the amount should be the same here whether the words

are inserted or not. But there are cases in which if the dum sola clause were eliminated, I should not think it right to give so large an amount. I confirm the registrar's report striking out the words, "or until she marries again."

1889

LISTER v. LISTER.

Solicitors for petitioner: *Roche & Sons.*
Solicitors for respondent: *Lumley & Lumley.*

W. L.

POWELL *v.* POWELL.

July 30.

Judicial Separation—Husband convicted of Aggravated Assault — Order of Justices for Separation and Maintenance—Refusal to admit of Husband's Evidence as to his Means—Appeal—Affidavits — 24 *&* 25 *Vict. c.* 100, *ss.* 42, 43—*Matrimonial Causes Act*, 1878 (41 *&* 42 *Vict. c.* 19), *s.* 4.

A husband having been summarily convicted of an aggravated assault on his wife within 24 & 25 Vict. c. 100, s. 43, the justices before whom he was convicted made an order that the wife should not be bound to cohabit with him and that he should pay her a weekly sum for her maintenance; and they refused to hear the husband's evidence as to his means:—

Held, on appeal, that the justices were warranted in refusing to allow the husband to be called as a witness, as it was not the intention of the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), that there should be any further hearing of the case by the justices after the conviction for assault:

Held, also, that on the hearing of the appeal affidavits as to the merits of the case could not be admitted.

Woods v. *Woods* (10 P. D. 172) followed.

APPEAL against an order made by justices in petty sessions, after conviction of a husband for an aggravated assault on his wife, directing that the wife should be no longer bound to cohabit with her husband, and that he should pay her a weekly sum for her support.

William Powell, the husband, was on June 24, 1889, convicted under the 24 & 25 Vict. c. 100, s. 43, by the justices at Carmarthen of an aggravated assault on his wife, Jane Powell, and sentenced to pay a fine of 20*s.* or to be imprisoned in default for fourteen days.

The justices further ordered, under the 41 & 42 Vict. c. 19, s. 4, that the future safety of the wife being in peril, she should no longer be bound to cohabit with him, and that he should pay to

1889

POWELL v. POWELL.

her the weekly sum of 20*s.* for her maintenance and support for such time as she continued to live apart from him.

Before the making of this order the husband's solicitor tendered him as a witness as to his means, but the justices refused to receive his evidence.

Toller, for the husband. The first ground of the appeal is the refusal of the justices to receive the evidence of the husband as to his means. They have no power under the 24 & 25 Vict. c. 100, to make an order for separation and maintenance. That is conferred upon them by 41 & 42 Vict. c. 19, and it is therefore an entirely separate proceeding. The separation order made by virtue of that Act is not a proceeding in any criminal charge. It is a separate proceeding, and the husband was a competent witness: *The Attorney-General* v. *Radloff*. (1)

[BUTT, J. I am very clear that the justices if they convict for an aggravated assault may go on without any further hearing to make the order for separation and maintenance contemplated in the 4th section of 41 & 42 Vict. c. 19.]

The justices were bound by the words of the section before making the order to satisfy themselves that it was in accordance with the means of the husband. They ought to have taken evidence on this subject, and the order should have said that the amount so paid was proper, having regard to the means of the husband. The affidavits now before the Court shew that the husband was only earning 14*s.* a week as a weaver.

[BUTT, J. I decline to receive affidavits on the merits.]

Under 41 & 42 Vict. c. 19, s. 4, sub-s. 2, there is an appeal to this Court against an order of the justices: *Hetherington* v. *Hetherington*. (2) Finally, the order for separation was wrong, because the justices only inflicted the penalty for a common assault under s. 42.

[BUTT, J. That is answered by *Woods* v. *Woods*. (3)]

Crosse, for the wife, was not called upon.

BUTT, J. The principal point here raised in objection to the order is that the justices who made it were wrong, because they

(1) 23 L. J. (Ex.) 240. (2) 12 P. D. 112.

(3) 10 P. D. 172.

did not receive, or refused to receive, the husband's evidence. Now, in my judgment, that contention is misconceived. The intention of the Act conferring this jurisdiction upon the justices is this, that they shall hear and determine the matter of assault, and if they find a man guilty of an aggravated assault upon his wife, they may go on to make an order giving the wife that protection which she would have under a decree of judicial separation, and also make an order upon the defendant to pay something for the wife's maintenance. That is what the justices have done in this case. I do not think it was the intention of the legislature or the meaning of the statute that there should be two separate hearings for the purposes of making the whole of the order. It is next said, that because the justices only fined this man twenty shillings, they have not found him guilty of an aggravated assault. I do not at all accept that view. They have fined him twenty shillings, and have gone on to order a weekly payment for the wife's maintenance. They expressly stated that they had found him guilty of an aggravated assault. Then as to the reception by me of affidavits filed by and on behalf of the husband. The appeal is given to this Division of the High Court by the concluding words of the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19). No rule or orders for regulating the practice with regard to these appeals appear to have been made; and I am not disposed to enter here into a controversy upon affidavits touching the merits of the case in relation to the decision of the magistrates. I therefore decline to receive the affidavits. That being so, I reject this motion and dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the appellant: *Indermaur & Brown.*
Solicitors for wife: *Crosse & Sons.*

W. L.

END OF VOL. XIV.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1890, will be as follows:—

In the First Series,
43 Ch. D.

In the Second Series,
24 Q. B. D. 15 P. D.

In the Third Series,
15 App. Cas.

INDEX.

ECCLESIASTICAL.

BISHOP—Illegal practices in conduct of divine service—Jurisdiction of Archbishop of Canterbury - - - - 88
See ECCLESIASTICAL LAW.

—— Minister — Illegal practices in conduct of divine service - - - 148
See ECCLESIASTICAL LAW. 2.

CHURCH—Illegal practices in conduct of divine service — Jurisdiction of Archbishop of Canterbury - - - - 88
See ECCLESIASTICAL LAW.

ECCLESIASTICAL LAW—*Bishop—Illegal Practices in Conduct of Divine Service—Jurisdiction of Archbishop of Canterbury.*] The Bishop of Lincoln was cited to appear before the Archbishop of Canterbury to answer the charge of having been guilty of illegal practices in the conduct of divine service. The bishop appeared under protest denying that the archbishop had jurisdiction to try a bishop of the Province of Canterbury, and affirming that the proper tribunal was the archbishop and other bishops of the province assembled in Convocation or otherwise:—*Held*, that the archbishop sitting alone or with assessors had jurisdiction to entertain the charge. READ *v.* BISHOP OF LINCOLN - - - - 88

2. —— *Bishop—Rubrics—Acts of Uniformity* (1 *Eliz. c.* 2, *and* 13 *&* 14 *Car.* 2, *c.* 4).] The word "minister," in the rubrics relating to the administration of the Holy Communion, must be taken to include a bishop, and a bishop officiating as minister in the service of the Holy Communion is bound to celebrate it in the order and form prescribed by the Book of Common Prayer. READ *v.* BISHOP OF LINCOLN - - - 148

STATUTES:—
1 Eliz. c. 2 - - - - - 148
See ECCLESIASTICAL LAW. 2.
13 & 14 Car. 2, c. 4 - - - 148
See ECCLESIASTICAL LAW. 2.

PROBATE.

ADMINISTRATION—*Grant—Application to pass over the Widow on the Ground of Misconduct—Citation—Practice*—21 *Hen.* 8, *c.* 5; 20 *&* 21 *Vict. c.* 77, *s.* 73.] On an application for a grant of administration to the father of the intestate, passing over his widow, against whom misconduct was charged, the Court refused to make the grant without citing the widow. IN THE GOODS OF MIDDLETON - - - - - 23

2. —— *Surviving Executor resident out of the Jurisdiction—Sole Legatee a Minor—Renunciation of Next of Kin—Grant under s.* 73 *of Probate Act* 20 *&* 21 *Vict. c.* 77) *to Testamentary Guardian not otherwise entitled.*] Upon an application for administration with the will annexed it appeared that the testator by his will had appointed two executors, and made his daughter, a minor, his sole legatee. Of the two executors one was dead, and the other at the time of testator's death was in Brazil, the date of his return being uncertain. The next of kin of the minor either renounced or were resident out of the jurisdiction.—The Court, upon proof that there was urgent need of immediate administration, made a grant to the paternal aunt of the minor, whom she had elected her testamentary guardian. IN THE GOODS OF BATTERBEE [39

3. —— *Chain of Representation—Estate administered in Chancery Division—Reduction of Amount of Administration Bond.*] Where an estate was being administered in the Chancery

ADMINISTRATION—*continued.*

Division and an order had been made that each individual share of the estate should be paid directly to the parties entitled, this Court allowed the penalty of the administration bond to be limited to double the amount of the beneficial interest of the applicant. In the Goods of A. Paxton. In the Goods of D. Bennison. In the Goods of H. Bennison - - - 40

4. —— *Administration Bond—Administrator pendente Lite—Payment of Premium to Guarantee Society out of the Estate.*] In a Probate action where an administrator pendente lite had been appointed and had been ordered to give security in a penal sum of 10,488*l.* for due administration of the estate, the Court, on the application of an intervener, allowed him to pay 50*l.* out of the estate to a guarantee society which was willing to enter into a bond on his behalf, on condition that the intervener should undertake to recoup the estate in the event of his failing in the suit and being condemned in costs. In the Goods of G. Harver - - - - - - 81

5. —— *Agreement between Parties interested in the Estate—"Special Circumstances"—20 & 21 Vict. c. 77, s. 73.*] Doubts having arisen as to the legitimacy of the person claiming to be next of kin, it was agreed between the persons interested in the estate of the intestate, that such claimant should apply for a grant of administration under 20 & 21 Vict. c. 77, s. 73, and that the estate should afterwards be divided between them and the claimant:—*Held*, that there were "special circumstances" to warrant the Court in making a grant to the person applying in pursuance of the agreement. In the Goods of Minshull 151

6. —— *Suit pending touching the Validity of Will of Executor—Grant of Administration pendente Lite to the Estate of Testator as to which there was no Litigation—20 & 21 Vict. c. 77, s. 70.*] A husband died leaving a will of which his wife was sole executrix at the time of his death. The executrix took out probate and died leaving a will the validity of which was disputed in a suit which was pending in the court. A representative of the husband being required to receive money due to his estate, the Court appointed an administrator pendente lite to the estate of the husband.—*In the Goods of Dawes* (Law Rep. 2 P. & D. 147) doubted but followed. In the Goods of Fawcett [152

AMENDMENT—Pleadings—Charge of fraud after case closed - - - - 56
See Practice. 2.

APPEAL — Probate — Appeal from registrar — Time for appealing - - - 42
See Practice.

BOND—Administrator pendente lite—Payment of premium to guarantee society out of the estate - - - - 81
See Administration. 4.

—— Administration — Estate administered in Chancery Division — Reduction of Amount of administration bond - 40
See Administration. 3.

CASES:—*Dawes, In the Goods of* (Law Rep. 2 P. & D. 147) followed - - 152
See Administration. 6.

EXECUTION—Will—Execution in the form of a deed—Attesting witnesses unable to recollect the circumstances of execution 48
See Will.

PLEADING—Amendment—Charge of fraud after case closed - - - - 56
See Practice. 2.

PRACTICE—*Appeal from Registrar—Time for appealing—Rules of Supreme Court, Order* LIV., *rr.* 12, 21.] The time for appealing from an order made by a registrar of the Probate Division is the same as that limited by Order LIV., r. 21, for appealing from an order of a master: viz. four days from the decision, although a registrar is not mentioned in that rule.—Decision of Butt, J., affirmed. In the Goods of John Patrick [C.A. 42

2. —— *Probate—Amendment of Pleadings—Charge of Fraud after Case is closed.*] In a probate suit where the onus of proof lay on the defendant, application was made by the plaintiff, after the defendant had been cross-examined and his case had been closed, for leave to amend the pleadings by adding a defence that the codicil in dispute had been obtained by the defendant's fraudulent misrepresentations, the evidence in support of such defence to be confined to matters arising upon the defendant's cross-examination:—*Held*, that the amendment might properly be allowed. Riding *v.* Hawkins - - 56

3. —— *Probate—Suit for Revocation—Jurisdiction of Registrar—Order for Trial at Assizes.*] The registrar, in a suit for revocation of probate, has no power to order the venue to be changed, and to direct that the suit be removed from this Court to be tried at the assizes. Lancaster *v.* Brook - - - - - - 80

—— Administration—Grant—Application to pass over the widow on the ground of misconduct—Practice - - - 23
See Administration.

—— Agreement between parties interested in the estate—"Special circumstances" 151
See Administration. 5.

—— Suit pending touching the validity of will of executor—Grant of administration pendente lite to the estate of testator as to which there was no litigation - 152
See Administration. 6.

REGISTRAR — Jurisdiction — Probate — Suit for revocation—Order for trial at assizes 80
See Practice. 3.

REVOCATION—Will—Partial or total revocation
See Will. 2. [49

—— Codicil torn up under misapprehension 82
See Will. 3.

RULES:—Order LIV., rr. 12, 21 - - 42
See Practice.

STATUTES:—
21 Hen. 8, c. 5 - - - - 23
See Administration.
20 & 21 Vict. c. 77, s. 73 - - - 39
See Administration. 2.

STATUTES—*continued.*
20 & 21 Vict. c. 77, s. 70 - - - 152
See Administration. 6.
—— —— s. 73 - - - - 151
See Administration. 5.
20 & 21 Vict. c. 77, s. 73 - - - 23
See Administration.

WILL—*Execution in the form of a Deed—Attesting Witnesses unable to recollect the Circumstances of Execution.*] Probate granted of a will executed in the form of a deed, although the attesting witnesses had no precise recollection of the circumstances of the execution. In the Goods of Colyer [48

2. —— *Partial or Total Revocation.*] A testator after duly executing his will, which was in five sheets, each of which was signed by himself and initialled by the attesting witnesses—took out three sheets and substituted three new ones—

WILL—*continued.*
which he signed, but which were not attested. He did not alter the date of the will, nor did he re-sign it, nor was it re-attested:—*Held*, that the will was not entitled to probate. Treloar *v.* Lean [49

3. —— *Probate—Codicil torn up under Misapprehension—Revocation.*] A testatrix, being under an erroneous impression that a codicil had not been duly executed, directed it to be torn up and sent to her solicitor to be recopied, but died before she could re-execute it:—*Held*, that, in the circumstances, probate of the codicil might be allowed. In the Goods of Thornton - 82

—— Administration—Will annexed—Sole legatee a minor—Renunciation of next of kin—Grant to testamentary guardian not otherwise entitled - - - 39
See Administration. 2.
WORDS—"Special circumstances" - - 151
See Administration. 5.

DIVORCE.

ATTACHMENT—Costs—Security—Default 17
See Practice.

CASES:—
—— *Lynch* v. *Lynch* (10 P. D. 183) approved 17
See Practice.
—— *Miles* v. *Chilton* (6 N. of Cas. 636) followed
See Nullity. [15
—— *Woods* v. *Woods* (10 P. D. 172) followed
See Judicial Separation. [177

CHILDREN — Custody — Judicial separation—Order for custody of children — Death of parent obtaining order—Application by third person for custody - 162
See Judicial Separation. 3.

CONDITION—Repugnancy—Prohibition against alienation—Forfeiture - - - 7
See Divorce.

CONDONATION — Adultery — Husband's incestuous adultery - - - 60
See Settlement.

CO-RESPONDENT—Leave to proceed without making co-respondent - - 13
See Practice.

COSTS—Judicial separation—Wife's costs—Security—Default—Attachment - 17
See Practice.

DAMAGES — *Husband and Wife living apart under Separation Deed—Subsequent Adultery—Effect of Separation Deed on the Amount of Damages.*] In a petition by the husband for dissolution of marriage claiming damages, it appeared that the petitioner and his wife had entered into a separation deed in consequence of her intimacy with the co-respondent, and that she committed adultery with him after the date of the deed.—*Held*, that the petitioner was entitled to the same

DAMAGES—*continued.*
amount of damages as he would have been had no separation deed been executed. Izard *v.* Izard [45

DESERTION—*Divorce—Two Years' Desertion not complete at the time of filing the original Petition—Amendment—Fresh Petition—Pleading.*] A petition presented by a wife for dissolution on the ground of adultery and cruelty was filed in August, 1886. In June, 1886, the respondent deserted his wife and had never afterwards returned to co-habitation, and in July, 1888, she obtained leave to amend her petition by adding a charge of desertion. The Court at the hearing, when the charge of cruelty was abandoned, declined to entertain the charge of desertion on the ground that the cause of action was not complete at the time of filing the petition, and, while ready to grant a judicial separation on the ground of adultery, *held*, that further relief could only be obtained by filing a fresh petition. Lapington *v.* Lapington [21

EVIDENCE — Divorce — Husband's petition — Countercharge of adultery—Rebutting evidence—Practice - - 62
See Practice. 6.

HUSBAND AND WIFE—Marriage with deceased wife's sister—Both parties cognisant of impediment - - - 15
See Nullity.
—— Husband's suit for divorce—Order to deliver up property to the wife—Jurisdiction of registrar - - - - 157
See Practice.
—— Divorce—Husband convicted of aggravated assault—Order by magistrate that wife be not bound to cohabit—Payment of weekly allowance—Order to secure wife's costs of suit—Husband entitled to legacy—Injunction - - - 158
See Judicial Separation. 2.

INJUNCTION—Husband and wife—Divorce—Husband convicted of aggravated assault—Order by magistrate that wife be not bound to cohabit—Payment of weekly allowance—Order to secure wife's costs of suit—Husband entitled to legacy 158
See Judicial Separation. 2.

INTERVENTION—Wife's petition—Husband's answer alleging adultery—Permission to alleged adulterer to intervene 154
See Practice. 5.

JUDICIAL SEPARATION—*Order for Custody of Children—Death of Parent obtaining Order—Application by Third Person for Custody*—22 & 23 *Vict. c.* 61, *s.* 4.] By 22 & 23 Vict. c. 61, s. 4, the Court after a final decree of judicial separation, &c., may, upon application for this purpose, make from time to time orders with respect to the custody of the children the marriage of whose parents was the subject of the decree, as might have been made by final decree:—*Held*, that upon the death of the parent of a child who was entitled to the custody of it under a decree for judicial separation, the Court had no jurisdiction under s. 4 to entertain an application by a stranger for the custody of the child. Davis *v.* Davis 162

2.—*Husband convicted of aggravated Assault—Order by Magistrate that Wife be not bound to cohabit—Payment of Weekly Allowance—Order to secure the Wife's Costs of Suit—Husband entitled to Legacy—Injunction*—41 & 42 *Vict. c.* 19, *s.* 4.] In a petition by the wife for dissolution of the marriage it appeared that before the petition, the husband having been convicted of an aggravated assault on his wife, a magistrate made an order under 41 Vict. c. 19, s. 4, that the wife be not bound to cohabit with her husband, and that he should pay to her the sum of 1*l.* weekly. In the suit in this court orders had been made on the respondent to pay 16*l.* and secure a further sum of 45*l.* to defray the wife's costs. The husband was entitled to the sum of 1400*l.* under the will of a deceased testatrix, and the wife had obtained an ex parte injunction restraining the husband from receiving any part of the legacy.—On an application for the continuation of the injunction and the appointment of a receiver, the Court continued the injunction in regard to the costs until the trial or payment of them, but declined to make any order for the enforcement of the magistrate's order for an allowance. Gillet *v.* Gillet [158

3.—*Husband convicted of Aggravated Assault—Order of Justices for Separation and Maintenance—Refusal to admit of Husband's Evidence as to his Means—Appeal—Affidavits*—24 & 25 *Vict. c.* 100, *ss.* 42, 43—*Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 4.] A husband having been summarily convicted of an aggravated assault on his wife within 24 & 25 Vict. c. 100, s. 43, the justices before whom he was convicted made an order that the wife should not be bound to cohabit with him and that he should pay her a weekly sum for her maintenance; and they refused to hear the husband's evidence as to his means:—*Held*, on appeal, that the justices were warranted in refusing to allow the husband to be called as a witness, as it was not the intention of the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), that there should be any further hearing of the case by the justices after the conviction for assault:—*Held*, also, that on the hearing of the appeal affidavits as to the merits of the case could not be admitted.—*Woods* v. *Woods* (10 P. D. 172) followed. Powell *v.* Powell - - 177

JUDICIAL SEPARATION—*continued.*

JUSTICES—Judicial separation—Husband convicted of aggravated assault—Order of justices for separation and maintenance—Refusal to admit husband's evidence as to his means - - - 177
See Judicial Separation. 3.

LEGITIMACY—*Marriage—Validity—Practice as to citing Parties other than the Attorney-General—Legitimacy Declaration Act* (21 & 22 *Vict. c.* 93)—*Greek Marriages Act*, 1884 (47 & 48 *Vict. c.* 20).] The practice in future in petitions under the Legitimacy Declaration Act and the Greek Marriages Act will be that, after citing the Attorney-General, the parties on applying to have the case set down for trial must lay the state of the case, by affidavit or otherwise, before the registrar, who will direct whether any, and if so which, other parties shall be cited to see proceedings. The registrar's direction to be subject to appeal to the judge in the same manner as all other orders of the registrar. Brinkley *v.* Attorney-General. Julia Scaramanga *v.* Attorney-General - - - - 83

MAINTENANCE—Dum sola clause - 175
See Practice. 8.

MARRIAGE—Validity—Practice as to citing parties other than the Attorney-General
See Legitimacy. [83

NULLITY—*Marriage with Deceased Wife's Sister—Both Parties cognizant of Impediment*—5 & 6 *Wm.* 4, *c.* 54, *s.* 2—20 & 21 *Vict. c.* 85, *s.* 22.] A decree will be made declaring a marriage with a deceased wife's sister null and void, although it is shewn that both parties at the time of the celebration of the marriage were aware of the impediment.—*Miles* v. *Chilton* (6 N. of Cas. 636) followed. Andrews *v.* Ross - - 15

PLEADING—Amendment—Two years' desertion not complete at the time of filing the original petition - - - 21
See Desertion.

PRACTICE—*Attachment—Wife's Costs—Security—Debtors Act*, 1869, *s.* 4.] In a wife's petition for judicial separation the husband was ordered to pay a sum of money into court as security for her costs. He made default in payment:—*Held*, that this was not "default in payment of a sum of money" within s. 4 of the Debtors Act, 1869, and that he was liable to attachment for disobeying the order of the Court.—*Lynch* v. *Lynch* (10 P. D. 183) approved. Bates *v.* Bates - C. A. 17

2.—*Divorce—Cross-Petitions—Both Parties found Guilty—Husband's incestuous Adultery—Condonation—Discretionary Bar.*] In cross-petitions by the husband and wife for dis-

PRACTICE—*continued.*

solution of marriage the jury found that the wife had committed adultery, and that the husband had committed adultery with the wife's sister and with another woman, and that the wife had condoned his adultery.—The Court in the circumstances refused to make any decree and dismissed both petitions. STOKER *v.* STOKER - - 60

3. —— *Divorce—Cross Petitions by Husband and Wife — Decree Nisi on Wife's Petition — Intervention by Queen's Proctor—Wife's Costs—Rule* 201 *of Divorce Rules.*] In cross-petitions by the husband and wife for dissolution of the marriage a decree nisi was pronounced on the wife's petition, and the husband was condemned in costs. Subsequently the Queen's Proctor intervened, and charged the wife with adultery, collusion, and suppression of material facts. The husband, in compliance with an order of the registrar, had paid money into Court to meet the wife's costs in both suits:—*Held*, that the wife was not entitled to have the money in Court paid out until the decree nisi had been made absolute. BUTLER *v.* BUTLER. BUTLER *v.* BUTLER AND BURNHAM - - - - - 160

4. —— *Divorce — Wife's Petition — Counter-charge of Adultery by the Husband—Leave to proceed without making a co-Respondent* — 20 *&* 21 *Vict. c.* 85, *s.* 28; 29 *Vict. c.* 32, *s.* 2.] In a wife's petition for divorce, her husband, in his answer, made a counter-charge of adultery against his wife, and prayed for a divorce. On an application made on behalf of the husband, by direction of the registrar, to be allowed to proceed without making a co-respondent, the Court granted the application, but reserved the question whether it has power to make a man a co-respondent in such a suit. CURLING *v.* CURLING - - 13

5. —— *Divorce—Wife's Petition—Husband's Answer alleging Adultery—Permission to alleged Adulterer to intervene* —20 *&* 21 *Vict. c.* 85, *s.* 28 —29 *&* 30 *Vict. c.* 32, *s.* 2.] Where in a wife's suit for dissolution of marriage the husband in his answer charged his wife with having committed adultery with a specified person, but did not pray for a dissolution of the marriage, the Court allowed the alleged adulterer to intervene and file an answer. WHEELER *v.* WHFELER AND RHODES [154

6. —— *Divorce—Husband's Petition—Counter-charge of Adultery—Rebutting Evidence*—32 *&* 33 *Vict. c.* 68, *s.* 3.] At the hearing of a petition by the husband for dissolution of marriage on the ground of his wife's adultery, in which the wife made a counter-charge of adultery against him: —*Held*, that the petitioner might, as part of the case opened by him, give his own evidence and call his witnesses in answer to the respondent's charge, or that he might in the alternative reserve his answer to the charge until the respondent's witnesses in support of it had been examined, but that he was not entitled to divide his case by giving his own evidence in the opening, and afterwards calling his witnesses in reply to the respondent's case. JACKMAN *v.* JACKMAN AND WILLOUGHBY - - - - - 62

7. —— *Husband's Petition—Order to deliver up Property to the Wife—Jurisdiction of Registrar* **PRACTICE**—*continued.*

—*Married Women's Property Act*, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.] In a husband's suit for dissolution the registrar made an order directing the husband to deliver up to the wife certain articles, which she claimed as her property:—*Held*, that the registrar had no jurisdiction to make such an order, and that it must be discharged, and the registrar directed to inquire and report as to the property in the articles in question. WOOD *v.* WOOD AND WHITE - - - 157

8. —— *Divorce — Permanent Maintenance—Dum sola Clause.*] A decree for dissolution of marriage was granted on the wife's petition, the husband having been guilty of adultery and aggravated cruelty. The Court in making an order for permanent maintenance directed that the husband should secure to the petitioner a sum equal to one-third of his ascertained income, and refused to confine the operation of the order to such period as the petitioner remained unmarried.—*Semble*, that where there is no such limitation upon the operation of the order the Court has a discretion to reduce the amount of the wife's allowance.—*Quære*, whether the Court has power to make an order for two allowances, one payable to the petitioner so long as she remains unmarried, and a different allowance to be payable to her in the event of her marriage. LISTER *v.* LISTER [175

—— Conjugal rights—Written demand for cohabitation and restitution of conjugal rights - - - - 26
See RESTITUTION.

QUEEN'S PROCTOR — Intervention—Cross-petitions by husband and wife—Decree nisi on wife's petition - - - 160
See PRACTICE. 3.

REPUGNANCY—Prohibition against alienation —Forfeiture—Repugnancy - 7
See SETTLEMENT.

RESTITUTION OF CONJUGAL RIGHTS—*Practice—Divorce and Matrimonial Causes Rules and Regulations*, 1866, *r.* 2—*Additional Rules and Regulations*, 1875, *r.* 175—*Written Demand for Cohabitation and Restitution of Conjugal Rights.*] In a suit for restitution of conjugal rights the "written demand for cohabitation and restitution of conjugal rights" referred to in rule 175 need not necessarily be made by the petitioner, but may be made by a solicitor on behalf of the petitioner.—A wife cannot take proceedings for the restitution of conjugal rights until she has used reasonable means to induce her husband to take her back, and although the "written demand" to be made before the filing of the petition need not be in any particular form, it must be of a conciliatory character.—Where therefore a formal letter was written by the petitioner's solicitor on her behalf, demanding restitution with a threat of legal proceedings in default, and it did not appear that there had been any previous friendly communications upon the subject between the parties:—*Held*, that such letter was not a proper "written demand" within rule 175. FIELD *v.* FIELD - - - - - C. A. 26

SEPARATION DEED—Parties living apart under separation deed—Subsequent adultery—Effect of separation deed on the amount of damages - - - - 45
See Damages.

SETTLEMENT—*Prohibition against Alienation—Absolute Interest—Forfeiture—Repugnant Condition.*] By an instrument in the form of a settlement but proved as a will, real and personal estate was given to trustees upon trust for the sole use and benefit of the respondent (son of the settlor), his heirs, executors, and administrators, to be assigned and transferred to him as soon as conveniently might be after the settlor's death, subject to a proviso that if the respondent should die unmarried and without issue his share should go over, and also that the property assigned in trust for the respondent was to be held by the trustees upon the express condition that he should not during his life have power to mortgage, sell, alien, charge or incumber any part of the property, and in that event the trustees should stand possessed of such property in trust for other persons.—*Held* (affirming the judgment of Butt, J. (13 P. D. 136), that the respondent took an absolute interest in fee simple under the instrument, and that the condition of forfeiture in case of charge or alienation was therefore void as repugnant; and accordingly that he could be ordered to secure to his divorced wife an annual sum for maintenance by a charge on his interest under the instrument.—And *semble* (per Bowen, L.J.) that the condition was limited to alienation during the lifetime of the settlor, in which case there would be no repugnancy. Corbett *v.* Corbett - 7

STATUTES:
5 & 6 Wm. 4, c. 54, s. 2 - - - 15
See Nullity.
20 & 21 Vict. c. 85, s. 22 - - - 15
See Nullity.
—— —— s. 28 - - - - 13
See Practice. 4.
—— —— —— - - - - 154
See Practice. 5.
21 & 22 Vict. c. 93 - - - 83
See Legitimacy.
22 & 23 Vict. c. 61, s. 4 - - - 162
See Judicial Separation.
24 & 25 Vict. c. 100, ss. 42, 43 - - 177
See Judicial Separation. 3.
29 Vict. c. 32, s. 2 - - - - 13
See Practice. 4.
29 & 30 Vict. c. 32, s. 2 - - - 154
See Practice. 5.
32 & 33 Vict. c. 68, s. 3 - - - 62
See Practice. 6.
41 & 42 Vict. c. 19, s. 4 - - - 158
See Judicial Separation. 2.
41 & 42 Vict. c. 19, s. 4 - - - 177
See Judicial Separation. 3.
45 & 46 Vict. c. 75, s. 17 - - - 157
See Practice. 7.
47 & 48 Vict. c. 20 - - - 83
See Legitimacy.

WILL—Property liable to be charged—Prohibition against alienation—Forfeiture 7
See Settlement.

ADMIRALTY.

ACTION—Collision—Action in rem—Notice of action - - - - - 34
See Collision. 2.

AGREEMENT—Salvage—Right to recover for work done - - - - - 3
See Salvage.
—— Salvage—Supervening circumstances 132
See Salvage. 2.

APPEAL—County Court—Admiralty appeal to Divisional Court—Appeal without leave to Court of Appeal - - - 1
See Practice.
—— Court of Appeal—Costs—Admiralty—Collision—Defence of inevitable accident
See Practice. 2. [51
—— County Court—Application to adduce fresh evidence—Judge sitting alone - 71
See Practice. 3.

ARREST—Co-owners—Arrest of chartered ship—Damages—Sale—Liability of purchaser
See Ship. [50

BILL OF LADING—Liability of shipmaster—Delivery of goods to consignee without production of bill of lading - 142
See Ship. 5.

CHARTERPARTY—Coals—Liability of charterer
See Ship. 2. [85

COLLISION—*Thames Rules—Rules* 6 *&* 7.] By the Rules for the Regulation of the Navigation of the River Thames between Yantlet Creek and Teddington Lock: Rule 6, "A sailing-vessel under way, or being towed, shall only carry the side lights provided by (*b*) and (*c*) of rule 5 for a steam-vessel under way." Rule 7, "A sailing-vessel or a barge when at anchor in the river shall carry, where it can best be seen, at a height not exceeding twenty feet above the hull, a white light or a globular lantern of not less than eight inches in diameter.—The plaintiff's sailing-barge, at the time of a collision, was dredging down the Thames with her anchor down to check her way, with her mast lowered on deck, and with a white light attached to the mast case:—*Held*, that the barge was not, under the circumstances, a sailing-vessel under way within rule 6 of the Thames Rules, or a vessel at anchor within rule 7 of the same rules, and, therefore, that she was justified in carrying the light which she did. The Indian Chief - - - - - - 24

2. —— *Action in rem—Notice of Action—City of Dublin Steam Packet Company*—6 *&* 7 *Wm.* 4, *ch. c. s.* 8.] By 6 & 7. Wm. 4, ch. c. s. 8, no action shall be brought in which the City of

COLLISION—*continued.*

Dublin Steam Packet Company shall be liable for any damage to any ship against such company, unless one month's notice in writing shall have been given to the company:—*Held*, that the word "action" in s. 8 did not apply to an action in rem. The Longford - - - 34

3. —— *Sailing Rules—Regulations for Preventing Collisions at Sea, arts.* 14 (*a*), 22, 23.] By the Regulations for Preventing Collisions at Sea, Art. 14: "When two sailing-ships are approaching one another so as to involve risk of collision, one of them shall keep out of the way of the other as follows, viz., (*a*.) A ship which is running free shall keep out of the way of a ship that is close-hauled."—Art. 22: "Where by the above rules one of two ships is to keep out of the way, the other shall keep her course." Art. 23: "In obeying and construing these rules due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."—Two sailing-ships at night were approaching each other so as to pass port-side to port-side. The one whose duty it was to keep out of the way under art. 14 (*a*.) altered her course and began to come across the course of the other. The master of the ship whose duty it was, under art. 22, to keep her course, at a distance of a quarter of a mile saw the red light of the other ship shut in, and her green light come into view. He continued to keep his course till the other ship herself could be seen, when it was too late to avoid the collision, which immediately occurred:—*Held*, by the Court of Appeal, reversing the decision of Butt, J., that the officer in charge of the ship which was primâ facie bound to keep her course should not have kept his course after he saw that the other vessel was going to cross his bows; and that art. 23 had then come into operation, and that therefore both ships were to blame for the collision. The Tasmania - - - 53

4. —— *Stern Light—Overtaking Ship—Regulations for Preventing Collisions at Sea, arts.* 2, 11.] By "the Regulations for Preventing Collisions at Sea," art. 2: "The lights mentioned in the following articles [which include art. 11] shall be carried in all weathers, from sunset to sunrise." By art. 11 "a ship which is being overtaken by another shall shew from her stern to such last-mentioned ship a white light or a flare-up light:"—*Held*, that it is a breach of the above Regulations for a vessel when no other vessel overtaking it is in sight to carry a white light permanently fixed upon its stern.—*Semble*, that art. 11 only contemplates the holding up or flashing of a light to an overtaking ship.—An overtaking vessel within the meaning of art. 11 is one which is approaching another from aft, and is more than two points abaft the beam of the foremost ship. The Imbro - - - - - 73

5. —— *Steam Trawler—Regulations for Preventing Collisions at Sea, Arts.* 10, 17, 23.] The plaintiffs' steam trawler, above twenty tons register, while fishing with her trawl down in the night and going at the rate of one and a half knots an hour, came into collision with the defendants' sailing ship. The trawler was carrying

COLLISION—*continued.*

a lantern in front of her foremast head, shewing a white, green, and red light, and about six or seven feet below it a white light, according to the provisions of art. 10 for Preventing Collisions at Sea, as amended by an Order in Council of December 30, 1884. The trawler did not attempt to get out of the way of the sailing ship, so as to comply with art. 17, by which a steamship is to keep out of the way of a sailing ship:—*Held*, that the trawler was not to blame for the collision; that art. 17 did not apply, inasmuch as there were "special circumstances" within the meaning of art. 23 which authorized a departure from art. 17, that by carrying the lights which she did, she apprised other vessels that she was not able to get out of the way, for such lights as she carried were the regular lights of steam vessels engaged in trawling which are not bound by the requirements of art. 17. The Tweedsdale [164

6. —— *Fog—Alteration of Helm.*] The plaintiffs' vessel while proceeding in a dense fog heard the whistle of the defendants' vessel about 3½ points on her starboard bow, and thereupon starboarded her helm. A collision, however, occurred, as the defendants' vessel struck her on her starboard quarter:—*Held*, that, under the circumstances, the plaintiffs' vessel was not to blame for starboarding her helm:—*Held*, also, that there is no general rule that a vessel when proceeding in a fog is not entitled to act with her helm, but that each case must depend upon the special circumstances. The Vindomora - 172

—— Thames rules—Rules 6 & 7 - - 24
See Collision.

—— Admiralty—Costs—Inevitable accident 51
See Practice. 2.

—— Stern light—Overtaking ship - - 73
See Collision. 4.

—— Limitation of liability—Stay of proceedings
See Practice. 4. [73

—— Steam trawler—Regulations for preventing collisions at sea - - - 164
See Collision. 5.

CO-OWNER—Arrest of chartered ship—Damages—Sale—Liability of purchaser - 50
See Ship.

COSTS—Collision—Inevitable accident - 51
See Practice.

COUNTY COURT—Admiralty appeal—Appeal without leave to Court of Appeal 1
See Practice.

—— Damage—Jetty in tidal river—Vessel of necessity grounding—Implied representation by wharfinger - - 64
See Ship. 2.

—— Fog—Alteration of helm - - 172
See Collision. 6.

FOREIGN LAW—Bill of lading—Liability of shipmaster—Delivery of goods to consignee without production of bill of lading - - - - 142
See Ship. 5.

LIMITATION OF LIABILITY—Incorrect register —Evidence - - - - 131
See Practice. 5.

—— Stay of proceedings—Claim for personal injuries and loss of life - - 73
See Practice. 4.

NEGLIGENCE—Wharf, proprietor of—Obstruction in bed of river—Damage - 138
See Ship. 4.

NOTICE OF ACTION—Admiralty—Action in rem
See Collision. 2. [34

PRACTICE—*Appeal from County Court to Divisional Court—Appeal from Divisional Court to Court of Appeal*—38 & 39 *Vict. c.* 50, *s.* 10.] The right of appeal from an order of a Divisional Court varying the judgment of a county court in an Admiralty cause is governed by the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 10, and an appeal may therefore be brought without leave from such an order to the Court of Appeal. The Lydia - - - - - 1

2. —— *Costs—Inevitable Accident.*] In an action for damage by collision in which the defence was inevitable accident, the plaintiffs obtained judgment on the ground that negligence on the part of the defendants had been proved.—On appeal to the Court of Appeal, the defence of inevitable accident was established, and the judgment reversed:—*Held*, that as the Admiralty Court is a division of the High Court of Justice, the general rule, in force in the other Divisions—that, in the absence of special circumstances, costs follow the event—ought to be followed in that court, and that, on the appeal being allowed, the defendants were entitled to the costs both of the appeal and in the court below. The Monkseaton - - - - - - 51

3. —— *Appeal from inferior Court—Application to adduce fresh Evidence—Judicature Act*, 1873, *s.* 52—*Order* LIX., *r.* 17.] An application to allow fresh evidence to be adduced at the hearing of an Admiralty appeal from an inferior Court may be made to a single judge of the Admiralty Division. The Eclipse - - 71

4. —— *Collision—Limitation of Liability—Stay of Proceedings—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 514.] In an action of limitation of liability the plaintiffs claimed a stay of proceedings in respect of claims for damage to ship and goods, and in respect of claims for personal injuries and loss of life, on paying into Court a sum representing 8*l.* per ton in respect of damage to ship and goods, and on giving security for the difference between 8*l.* and 15*l.* in respect of claims for personal injuries and loss of life:—*Held*, that the stay of proceedings might be ordered in respect of the claims for damages to ship and goods, but not in respect of the claims for personal injuries and loss of life. The Nereid - - - - - 73

5. —— *Limitation of Liability—Incorrect Register—Evidence*—25 & 26 *Vict. c.* 63, *s.* 54—17 & 18 *Vict. c.* 104, *s.* 26.] In an action of limitation of liability the defendants by their defence denied that the registered tonnage of the plaintiffs' ship was the correct tonnage, and at

PRACTICE—*continued.*
the hearing tendered evidence in support of their defence:—*Held*, that the evidence was admissible. The Recepta - - - - - 131

RIVER—Wharf, proprietor of—Liability—Obstruction in bed of river—Negligence
See Ship. 4. [138

RULES:—
—— Order LIX., r. 17 - - - 71
See Practice. 3.

SAILING RULES—Collision—Articles 14 (a), 22, 23 - - - - 53
See Collision. 3.

SALVAGE—*Agreement to attempt to tow—Payment for Work done.*] In an action of salvage it appeared that the master of the defendants' ship requested the master of the plaintiffs' ship to tow his vessel to Gibraltar, which the latter agreed to attempt to do. The value of the defendants' ship, her cargo and freight, was 78,000*l.*, and at the time this request was made she was in a disabled state. The plaintiffs' ship, after towing the defendants' ship for 130 miles towards Gibraltar, left her, the hawsers having parted owing to severe weather, in a more dangerous position than she was in when she was taken in tow. The defendants' ship was afterwards towed into Gibraltar by another vessel:—*Held*, that the plaintiffs were not entitled to a salvage reward, but were entitled to adequate remuneration for what they had done in fulfilment of their contract. The Court awarded them 400*l.* The Benlarig - - - - - 3

2. —— *Agreement—Supervening Circumstances.*] The plaintiffs' steamer fell in with the defendants' steamer, which was disabled, about 260 miles from Gibraltar, and sixty miles from Carthagena. The weather at the time was described as "moderately" bad. An agreement was entered into between the captains of the two vessels by which it was agreed that the defendants' steamer should be towed to Gibraltar for the sum of 600*l.*, and that she should provide ropes and hawsers. The next day the weather became much worse, the wind blowing like a hurricane. The hawsers were several times broken, and, at length, one sound rope only was left. The plaintiffs' steamer, therefore, towed the disabled vessel to Carthagena instead of to Gibraltar. In an action of salvage Butt, J., *held*, that the contract had been put an end to by supervening circumstances, and awarded the salvors 900*l.* The defendants appealed:—*Held* by the Court of Appeal, that the circumstances had made the service wholly different from that contemplated by the parties; that the Court had authority to deal with the question as though no contract had been made; and that the decision of Butt, J., was therefore right, and must be affirmed. The Westbourne - - 132

SHIP—*Co-owners—Arrest of Chartered Ship—Damages—Sale—Liability of Purchaser—Liability of Trading Owners.*] The Vindobala 50

2. —— *Charterparty—Coals—Liability of Charterer.*] By a charterparty between the de-

SHIP—*continued.*

fendants, the owners of a steamer, and the charterers, it was agreed that the owners should maintain her in a thoroughly efficient state during the term of the charterparty, and that the charterers should provide and pay for coals and fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever not appertaining to the working or efficiency of the steamer. It was also agreed that, if in consequence of a breakdown of machinery the vessel put into a port other than that to which she was bound, "port charges, pilotages and other expenses" should be borne by the owners. The steamer put into Vigo, a port to which she was not bound; in consequence, as was alleged by the master, of the breakdown of the condenser. The master sued the defendants in an action for disbursements for the price of coals supplied to him at Vigo:—*Held*, that, even assuming that the putting into Vigo was a necessary consequence of the breakdown of the machinery of the steamer, the price of the coals supplied there was not part of the "port charges, pilotages, and other expenses at the port" within the meaning of the charterparty, and the defendants were not liable. The Durham City - - - - - - 85

3. —— *Damage—Jetty in Tidal River—Vessel of necessity grounding—Implied Representations by Wharfinger.*] The defendants, wharfingers, in consideration of charges for landing and storing the cargo, agreed to allow the plaintiff, a shipowner, to discharge his vessel at the defendants' jetty, which extended into the River Thames, where the vessel must necessarily ground at low water. The bed of the river adjoining the jetty was vested in the Conservators. The defendants had no control over the bed of the river, and had taken no steps to ascertain whether it was or was not a safe place for the vessel to lie upon. The vessel, on grounding, sustained damage from the uneven condition of the bed of the river adjoining the jetty:—*Held*, affirming the judgment of Butt, J., that the defendants were liable, for the use of their premises by the plaintiff could not under the circumstances be had without the vessel grounding, and the defendants must, therefore, be deemed to have impliedly represented that they had taken reasonable care to ascertain that the bottom of the river adjoining the jetty was in such a condition as not to cause injury to the vessel. The Moorcock - - 64

4. —— *Damage—Wharf—Obstruction in Bed of River—Negligence.*] By charterparty it was agreed that the plaintiffs' vessel should load a cargo of iron ore; proceed to Newport, Monmouthshire, and deliver the cargo as directed by the consignees or their agent. By the bill of lading, which incorporated the conditions of the charterparty, the cargo was to be delivered to named consignees or their assigns. The bill of lading was indorsed to the defendants, who were proprietors of a wharf on the river Usk at Newport, and lessees of part of the bed of the river in front of the wharf. The vessel proceeded to

SHIP—*continued.*

Newport, and was ordered by the defendants to discharge the cargo at their wharf. It appeared that there were two berths at the wharf, the first alongside the wharf and the second outside the first berth. In the space between the two berths a ridge of mud had been allowed by the defendants to accumulate. The plaintiffs' vessel, while approaching the wharf, struck upon this ridge and was damaged:—*Held*, that the space between the two berths must be considered as part of the frontage of the wharf, that it was therefore the duty of the defendants to keep such space in a reasonably safe condition or to give due warning of its being in a dangerous state, and that they were liable for the damage sustained. The Calliope - - - - - - 138

5. —— *Bill of Lading—Goods to be delivered to named Consignee or his Assigns—Duty of Shipmaster—Delivery of Goods without production of Bill of Lading—German Law.*] Where by the terms of a bill of lading the goods are to be delivered to a named consignee or his assigns the master is not entitled to deliver the goods to such consignee without the production of one of the parts of the bill of lading.—The plaintiffs shipped goods in London on board a German vessel belonging to the defendants, under a bill of lading, drawn in two parts, by which the goods were to be delivered at a German port to the consignee named in the bill of lading or to his assigns.—The master delivered the goods at the port of discharge to the consignee without the production of either part of the bill of lading:—*Held*, upon proof that the German law did not essentially differ from the English law, that the defendants were liable for wrongful delivery of the goods. The Stettin - - - - 142

—— Register—Tonnage—Evidence—Limitation of Liability - - - 131
See Practice. 5.

STATUTES:—

6 & 7 Wm. 4 Ch. c. s. 8 - - - 34
See Collision. 2.

17 & 18 Vict. c. 104, s. 26 - - 131
See Practice. 5.

—— —— s. 514 - - - - 73
See Practice. 4.

25 & 26 Vict. c. 63, s. 54 - - - 131
See Practice. 5.

38 & 39 Vict. c. 50, s. 10 - - - 1
See Practice.

THAMES RULES—Rules 6 & 7 - - 24
See Collision.

WHARF, PROPRIETOR OF—Vessel discharging cargo at wharf—Implied representation as to condition of bottom of river 64
See Ship. 3.

—— Negligence—Obstruction in bed of river 138
See Ship. 4.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.